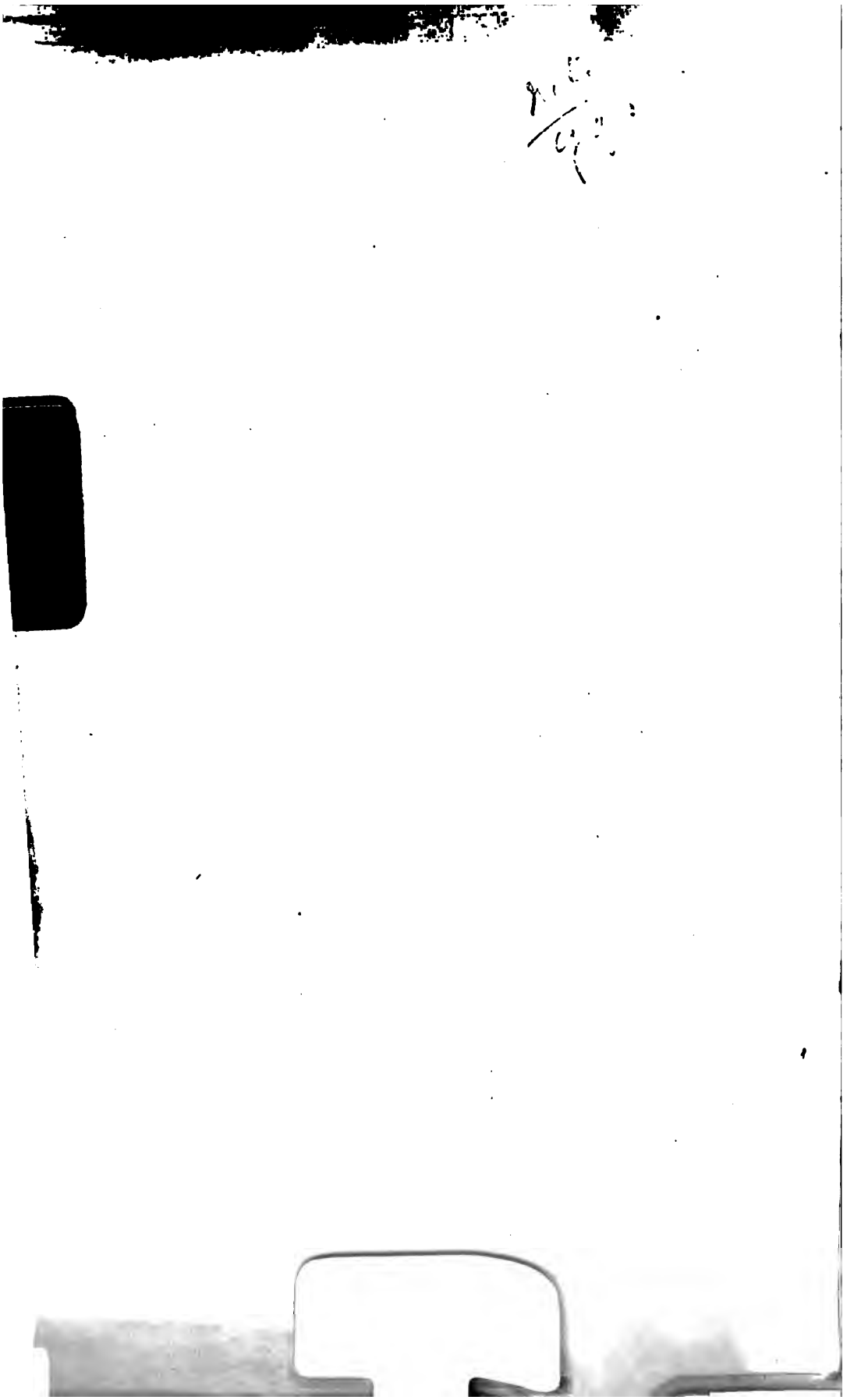

PRINCIPLES

OF THE

LAW OF WILLS

WITH SELECTED CASES.

BY

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PREFACE.

This book is composed in part of text, devoted to stating and explaining the principles and the important features of the law of wills; and in part of selected cases in which the facts illustrate and the opinions expound and apply that law. The main purpose in preparing it has been to furnish a book specially adapted to the needs of law students. All statement and discussion, therefore, of such details as do not assist in a thorough and accurate comprehension of the scope and principles of the subject, have been excluded. But abundant citations in the notes, of decided cases—carefully selected from the whole range of English and American decisions—not only furnish authority for the statements in the text, but direct attention to the best material for wider reading and study. Within this range, no pains have been spared in the effort to render the text complete, accurate, and clear.

As for the selected cases, they have been chosen solely with reference to their intrinsic value for the present purpose, without regard to locality of jurisdiction, or date. Some of them are English and others American. The latter represent nearly every American State. One of the cases was decided in 1654; nearly all of them are modern, a large number recent, and several were decided in this present year.

In some instances where such a course appeared desirable, the statements of the text have been followed with a succession of "Illustrations," each of which gives a very brief statement of facts from a reported case, with the decision of the court. Thus, for

example, under Execution, light is thrown on the meaning of the common statutory phrase, "in the presence of the testator," by seventeen illustrations which serve to mark out the proper boundaries of the requirement and the bearing of which is summed up in the text.

It would be hardly justifiable to express a conviction that this book will prove as useful to practising lawyers as to the student. But it is believed that it will prove useful even to them as a compact and careful review and summary of the important principles and doctrines in its field, and as a convenient means of reference to the best and most telling authorities. The very wealth of material in the large treatises,—some of which are beyond all need of praise for their great worth and practical value,—often renders it difficult to determine which of the army of cases cited are the best for reading or reference. Here the citations are, so to speak, few, but they are carefully chosen and important. For lawyers who have not convenient access to large libraries, the selected cases also constitute a reservoir of valuable original authorities.

The book is furnished with a full index, and the table of cases refers both to the official reports and to the volumes of the National Reporter System.

S. C.

NEW YORK, *September*, 1892.

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White *v.* Starr (47 N. J. Eq. 244, 20 A. 875), 14.
White *v.* Trustees of British Museum (6 Bing. 310), 239.
White, In the Goods of (2 Notes of Cases 461), 271.
White, Will of (25 N. J. Eq. 501), 353.
White's Will (121 N. Y. 406, 24 N. E. 935), 18.
Whitely *v.* King (10 Jur. (N. S.) 1079), 375.
Whitney *v.* Ferris (10 Johns. 66), 165.
Wigg *v.* Wigg (1 Ath. 382), 451.
Wilbur *v.* Wilbur (129 Ill. 392, 21 N. E. 1076),
Wilcox *v.* Wilcox (13 All. 252), 468.
Williams *v.* Cushing (34 Maine 370), 321.
Williams *v.* McCall (12 Conn. 328), 455.
Williams *v.* Tolbert (66 Ga. 127), 395.
Williams *v.* Tyley (Johns. (Eng.) 530), 353.
Williams' Will (15 N. Y. Supp. 828), 215.
Williamson *v.* Nabers (14 Ga. 286), 128, 163.
Willis *v.* Mott (36 N. Y. 486), 241.
Wilson *v.* Mitchell (101 Penn. St. 495), 14, 148.
Wilson, In the Goods of (L. R. 1 P. & D. 269), 274–275.
Wilson *v.* Wilson (3 Phillim. 543), 371.
Windham *v.* Chetwynd (1 Burr. 414; s. c. 1 W. Bl. 95), 301.
Wineland, Appeal of (Pa.) (12 Atl. Rep. 301, 118 Penn. St. 37), 230.
Winn, In the Goods of (2 Sw. & Tr. 147), 398–399, 400, 423.
Winslow *v.* Kimball (25 Me. Rep. 493), 300, 305–306.
Winter *v.* Perratt (9 Clark & F. 688), 465.
Wisener *v.* Maupin (2 Baxt. 342), 260.
Wood *v.* McGuire (15 Ga. 205), 454.
Wood *v.* Wood (L. R. 1 P. & D. 309), 371.
Wood, Matter of (36 Cal. 75), 385, 386.
Woodward, In Goods of (L. R. 2 P. & D. 206), 324.
Wooldridge *v.* Hancock (Tex.) (6 S. W. 818), 430.
Wyman *v.* Symmes (10 Allen 153), 300.
Wynne *v.* Hawkins (1 Bro. C. C. 179), 456.

Yates *v.* Cole (1 Jones' Eq. 110).
Youndt *v.* Youndt (3 Grant 140), 328.
Younger *v.* Duffie (94 N. Y. 535), 230, 236.

Zeisweiss *v.* James (63 Penn. St. 463), 428.

THE LAW OF WILLS.

THE LAW OF WILLS.

INTRODUCTION.

The right to bequeath personal property by will has existed from the earliest days of our law. For a long time, however, the wife and children of a testator were entitled to a portion of his personal property, and it was only to the balance that his testamentary power applied, subject to certain claims of his lord and the church. By slow degrees these restrictions were removed, and at last the testator was left free to bequeath all his personal property according to his own will.[1]

As to real estate, the owner had, before the Conquest, full power to devise his land. With the introduction, however, of the feudal system, this power of course disappeared. It was indirectly revived, after a time, by various devices which enabled the owner of lands to direct the disposition of them after his death. And by the statute of 32 Hen. VIII., ch. 1, explained by that of 34 Hen. VIII., ch. 5, and known as the Statute of Wills, power of devising land by will in writing was to a large extent bestowed anew upon all persons seised in fee-simple (except married women, infants, idiots, and persons of non-sane memory). And as a result of subsequent statutes the removal of the old *general restrictions* has been made complete. Owing to the obvious necessity of prescribing a detailed method of executing wills, and affording proper means of proving their execution, it was provided by the Statute of Frauds, 29 Car. II., ch. 3, that all devises of lands and tenements should not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction, and be subscribed in his presence by three or four credible witnesses.[2]

The Statute of Frauds did not apply to wills of personal prop-

[1] 2 Blackst. Comm. 491–493.

[2] 2 Blackst. Comm. 374–376.

erty, but by the present English Statute of Wills, 1 Vict., ch. 26, the rules concerning execution of wills of real and of personal property were assimilated. This statute provides that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

In this country the various States have enacted Statutes regulating the power and the method of making wills. These statutes vary in their requirements, and in any given case the local controlling law must be consulted.

Nowadays, as a general proposition, and subject to certain safeguards and restrictions, every one has the right to make a will. But in order to understand and apply this principle correctly, it is necessary in the first place to determine precisely what is here meant by the word "will." It is very important just here to notice that, as used in the law, it has two distinct meanings. In one sense, it refers to something in the testator's own mind, his wish, his determination, his "will" concerning the disposal of his property after death. In the other sense, it refers to the formal statement in which he expresses that wish. Thus the testator's own wish, and the due statement thereof, are both called his "will." Now the critical importance of the distinction is this: that the formal statement called a "will" derives its only intrinsic value from the fact that the other will—namely, the determination in the mind of the testator—was back of it and is embodied in it. Unless this is so, it is a mere form of words, of no force or value whatever—it is not the testator's *will* at all. The manner in which this distinction and this proposition may be applied to illuminate the dark corners, and solve the difficult problems of the Law of Wills, will be further referred to in a moment, and will be constantly illustrated throughout this book.

In order to make it as certain as possible that the real wills of testators shall be enforced, and that instruments that only purport to be, but really are not such, shall be disapproved, the law has thrown certain safeguards around the general principle with which we started. These are sometimes spoken of as if they were exceptions to the general principle that everybody has the right to make a will; but, apart from certain incidental or minor features which will be mentioned hereafter, and one or two exceptions which have faded or are now fading away, nothing could be a greater mistake. Thus, the law generally provides that the testator must be of "sound mind." This is not an exception to the general principle that every one may make a will, for that rule perforce only applies to persons capable of having wills or purposes of their own to be expressed. As a testamentary instrument, to be valid, must stand for the real purpose of the testator, it is no exception to the rule to go on to say that it only applies to him who is capable of having a real purpose. If he has not a sound mind he cannot fairly be said to have a will suitable to dispose of his property, and *having* no will, he cannot *make* a will.

So, for the same purpose, the law requires certain formalities in the execution of wills. These are intended solely for the same purpose, namely, to insure a careful, accurate, and genuine statement of the testator's wish or will. These and other requirements and safeguards of a similar nature, and also one or two exceptions to the general rule, will be considered more fully hereafter.[1]

Although the statutes conferring the right, and prescribing the method, of making wills are usually simple and brief, yet a great body of law has grown up, consisting of decisions in cases where it was claimed that the instrument in question either did not in fact represent, or was not duly proved to represent, the will of a competent testator. The grounds on which these claims have rested vary greatly among themselves in their details, but they may be grouped in a few general classes. The whole Law of Wills may best be considered under six main heads,—1. Testamentary Incapacity (or the question whether the particular testator fell short of the general statutory measure of persons competent to have and

[1] See Infancy, p. 5; Coverture, p. 7; Alienage, p. 10; Crime, p. 10; Mental Unsoundness, p. 12.

to express their own will); 2. Undue Influence or Restraint (or the question whether the testator may have been crowded into expressing the will of somebody else instead of his own); 3. Execution, Revocation, and Republication (or the question, first, whether the statutory formalities prescribed in order to insure solemnity, precision, and certainty in setting forth testator's wishes, have been observed; secondly, whether he subsequently reversed his wish and will, and duly revoked the former expression of it; and thirdly, whether he has duly republished any former testamentary instrument); 4. The instrument itself, its make-up, its nature, scope, and various kinds and forms; 5. Construction (or the determination, according to certain principles—some natural and some more or less arbitrary—of the exact wishes and intentions which testator has in fact expressed); 6. Probate (or the proceedings in court to establish the will as indeed the real and duly expressed and authenticated wish of a competent testator). This latter subject, however, belongs partly under the head of Practice and partly under Evidence. The leading rules of evidence applying peculiarly to the proof of wills are, however, discussed and illustrated in this book.

CHAPTER I.

TESTAMENTARY INCAPACITY.

I.—Infancy.
II.—Coverture.
III.—Alienage.
IV.—Crime.
V.—Mental unsoundness.

I. INFANCY.

It was formerly the law in England that a will of personal property might be made by a male infant at the age of fourteen, and by a female infant at the age of twelve.[1]

The right to make a will of freehold estates in land did not exist, after the Conquest, even in adults, until conferred by 32 Hen. VIII., ch. 1, explained by 34 Hen. VIII., ch. 5,[2] which also fixed the age at which the right should begin, at twenty-one years.[3] Subsequently, the statute 1 Vict., ch. 26, prescribed the age of twenty-one, in all cases, whether the property disposed of was real or personal. And so the law of England now stands. Many of our States, as Massachusetts, have adopted the same rule.[4] Other States have adopted other rules;[5] in some, as Connecticut,[6] an earlier age is named; while in others, as New York, the English

[1] 1 Blackst. Comm. 463; Arnold v. Earle, 2 Lee's Reports by Phillimore, 529, where in 1755 a boy of sixteen made a will in favor of his schoolmaster which was sustained.

[2] 2 Blackst. Comm. 374, 375.

[3] 1 Jarm. on Wills, 32.

[4] Mass. Pub. St. 747, sec. 1.

[5] But whatever age may be fixed, an infant under that age cannot make a will. Moore v. Moore, 23 Tex. 637.

[6] Conn. G. S., sec. 537.

rule is followed in wills of realty,[1] while in those of personalty[2] the age is fixed at eighteen in males and sixteen in females. It is very important here to notice that this exclusion of infants is not a mere arbitrary rule. The unfitness of children to deal with matters of such importance is a fact of nature. The law, in the interest of convenience and certainty, merely fixes the particular point at which the disability shall cease and the right shall begin.

ON WHAT DAY AN INFANT COMES OF AGE.

Anonymous.

MICH. 8 ANN. B. R.

(1 Salk. 44.)

"It has been adjudged[3] that if one be born the first of February, at eleven at night, and the last of January in the twenty-first year of his age, at one of the clock in the morning, he makes his will, of lands, and dies, it is a good will, for he was then of age. *Per Holt*, C. J.

The State v. Clarke.

(1840. 3 Harring. (Del.) 557.)

Kent, October term.

The defendant was presented by the grand jury for illegal voting at the late inspector's election. The presentment set forth these facts, to wit: that the defendant was born on the 7th of October, A.D. 1819, and voted at the election held on the 6th of October, 1840.

In his behalf a motion was now made to quash the presentment, on the ground that it appeared from the face of it that the defendant was of full age at the time he voted, and was, therefore, not guilty.

Mr. Clayton, for the defendant, cited 1 Black. Com. 497.

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[1] 2 R. S. 56, sec. 1, as amended L. 1867, ch. 782, sec. 3.

[2] 2 R. S. 60, sec. 21, as amended L. 1867, ch. 782, sec. 4. But when a will is made by a minor the courts will examine the circumstances with more than usual care to see that it really represents the deliberate and intelligent wish of the testator, and, if this is doubtful, will refuse probate. Seiter v. Straub, 1 Dem. (N. Y.) 64.

[3] In Herbert v. Tarball, 1 Keb. 589.

By the Court.

BAYARD, *Chief Justice* (after stating the constitutional provision which employs the phrase "of the age of twenty-one years"). To ascertain when a man is legally of the age of twenty-one years, we must have reference to the common law, and those legal decisions which from time immemorial have settled this matter, in reference to all the important affairs of life. When can a person make a valid will; when can he execute a deed for land; when make any contract or do any act which a *man* may do, and an *infant*, that is, a person under the age of twenty-one years, cannot do? On this question the law is well settled; it admits of no doubt. A person is "of the age of twenty-one years" the day *before* the twenty-first anniversary of his birthday. It is not necessary that he shall have entered upon his birthday, or he would be more than twenty-one years old. He is, therefore, of age the day before the anniversary of his birth; and as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birthday; and upon any and every moment of that day may do any act which any man may lawfully do. (1 Chit. Gen. Prac. 766). "It is to be observed, that a person becomes of age on the first instant of the last day of the twenty-first year *next before* the anniversary of his birth; thus, if a person were born at any hour of the 1st of January, A.D. 1801 (even a few minutes before 12 o'clock of the night of that day), he would be of full age at the first instant of the 31st of December, A.D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes; because there is not in law in this respect any fraction of a day; and it is the same whether a thing is done upon one moment of the day or another."

On the face, then, of this presentment, it appears that Mr. Clarke was entitled to vote on the 6th of October, being on that day of the age of twenty-one years; and the presentment, showing no offence, must be quashed.

II. COVERTURE.

As a general proposition, a married woman could not, under the common law, make a will of either real or personal property,[1] and

[1] 2 Blackst. Comm. 498; Bransby v. Haines, 1 Lee's Rep. by Phillim. 120.

even when the right to devise freehold estates was created by the acts of 32 and 34 Hen. VIII., married women were excluded from their operation. The underlying reason for this disability was not, as in the case of infancy, merely the actual or supposed incapacity of the testatrix, but—at least in large part—the theoretical merger of the married woman's identity and interests in those of the husband. This being the reason, there were four classes of cases where the reason for the rule did not apply, and where, consequently, the right to make a will existed.

1. She might make a valid will of personal property if her husband gave his consent[1] to the very instrument in question,[2] with knowledge of its contents,[3] and did not revoke his consent before it was actually probated;[4] and survived the wife.[5]

2. So if she was executrix under the will of a testator, she might, in her capacity of executrix, make a will and appoint an executor for the purpose of continuing the representation of the original testator.[6]

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[1] 2 Blackst. Comm. 498; Fisher v. Kimball, 17 Vt. 323.

As to real property, a married woman could, at the common law, with the concurrence of her husband, by means of a fine (for a statement of the nature and effect of a fine—now abolished in England and not used in this country—see 2 Blackst. Comm. 348, *et seq.*), transfer title to another, as trustee, reserving the power to appoint by will the disposition that should be made of it by the trustee. In this sense, she could, so to speak, make a will of lands with her husband's consent. Dillon v. Grace, 2 Sch. & Lef. 456 (463–4); Opinion of Jackson, J., in Osgood v. Breed, 12 Mass. 525 (531–2); Opinion of Chancellor Kent, in Bradish v. Gibbs, 3 Johns. Ch. 523 (539, 540, and authorities cited).

But properly speaking, she could not make a will of land even with the husband's consent. Osgood v. Breed, 12 Mass. 525, where the reasons of this distinction between real and personal property are clearly explained. Marston v. Norton, 5 N. H. 205.

[2] Rex v. Bettesworth, 2 Stra. 891; Cutter v. Butler, 25 N. H. 343.

[3] Willock v. Noble, L. R. 7 Eng. & Ir. Appeals (H. L.) 580.

[4] Brook v. Turner, 2 Mod. 170. But if he once consented to the will, either expressly or by implication, *after* the wife's death, he could not revoke. Id.

[5] 1 Redf. on Wills, 25. See also Noble v. Phelps, L. R. 2 P. & D. 276; on appeal, L. R. 7 Eng. & Ir. Appeals, 580. If the husband did not survive the wife, the will made by his consent, during coverture, failed, but she might then, of course, make a new will, as a *feme sole*.

[6] Scammell v. Wilkinson, 2 East. 552; s. c. sub nom. Stevens v. Bagwell, 15 Ves. 139; Willock v. Noble, L. R. 7 Eng. & Ir. Appeals, 580 (589, 590).

3. So she might dispose by will of her "separate property,"[1] and also,

4. She might make a will, or an instrument of like nature, in execution of a power conferred on her to that effect.[2]

The present English Statute of Wills (1 Vict., c. 26, sec. 8), provides that "no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act." The exceptions thus provided for may all be classified under the four heads already named.[3]

In America these general rules of the English law concerning the right of a married woman to make a will are also in force, except as qualified by decisions, or changed by statutes. But the restriction on her right has, in general, been modified, and in some States in large degree or entirely abolished. Even the States, however, that have made most substantial progress in this direction differ widely in details, and in the particular stage to which the movement has brought them. For this reason, and also because new legislation in favor of still greater rights is frequent, it would be useless here to attempt a detailed statement of the present laws on this subject in the various States.

[See Stoutenburgh v. Hopkins, 43 N. J. Eq. 577 (12 Atl. Rep. 689); Gregory v. Oates (Ky.), 8 S. W. Rep. 231; Appeal of Cooke, 132 Penn. St., 533.]

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[1] Fettiplace v. Gorges, 1 Ves. Jr. 46; Perkins v. Towery (Ky.), 8 S. W. Rep. 604; Willock v. Noble, L. R. 7 Eng. & Ir. Appeals, 580; Tappenden v. Walsh, 1 Phill. 352; Rich v. Cockell, 9 Ves. 369 (379); Hadden v. Fladgate, 1 Sw. & Tr. 48. So as to the fee of her separate real property, Taylor v. Meads, 4 De G. J. & S. 597; Hall v. Waterhouse, 5 Giff. 64; Tullett v. Armstrong, 1 Beav. 1. See, however, Osgood v. Breed, 12 Mass. 525; Marston v. Norton, 5 N. H. 205; West v. West, 3 Rand. (Va.) 373. Her right might, however, even in the case of separate property, be restricted or cut off by the terms of the instrument out of which her separate interest in the property in question arose. This restriction was often effected by a clause "against anticipation." Bispham's Equity, § 104; Lewin on Trusts, 123. For a long and elaborate discussion of the subject of a married woman's separate property and her power of disposition, citing a great number of English and American authorities, see note to Hulme v. Tenant, 1 Leading Cas. Eq. (Hare & Wallace's 4th Am. Ed., p. 679).

[2] Heath v. Withington, 6 Cush. 497; 2 Kent Comm. 170, 171; 4 Kent Comm. 506; Sugden on Powers, Chap. V.; Perkins v. Towery (Ky.), 8 S. W. Rep. 604.

[3] Willock v. Noble, L. R. 7 Eng. & Ir. Appeals, 580.

III. ALIENAGE.

At common law an alien might hold land as against all except the crown, and even as against the crown until office found.[1] He had, therefore, only a defeasible title, but such as it was, he might devise it, in which case it still remained subject, in the hands of the devisee, to the same rights of the crown to seize it after office found.[2] This incapacity to hold absolutely, and consequently to give an indefeasible title by devise, arose from feudal and political reasons not applicable to personal property, which might, therefore, be bequeathed by an alien.[3]

Following earlier legislation, however, on this subject in England, the Act of 33 Vict., c. 14, sec. 2 (1870), provides that "real and personal property of every description may be taken, held, acquired, and disposed of by an alien in the same manner as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, and in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject."

The laws of our States have, in some cases, abolished, and in others have modified the old English rules. The present laws of the various States vary very widely from one another, and the local statutes and decisions must in every case be consulted.

IV. CRIME.

The former law of testamentary incapacity arising through criminal conduct is stated by Blackstone as follows:

"Persons incapable of making [wills and] testaments, on account of their criminal conduct, are, in the first place, all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king

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[1] As to the distinction between an alien enemy and an alien friend, see 1 Redf. on Wills, 13; Fairfax's Devisee v. Hunter's Lessee, 7 Cranch, 603. Compare, as to bequests of personalty, on this point, *infra*, note 3.

[2] 1 Jarman on Wills, 41.

[3] Du Hourmelin v. Sheldon, 1 Beav. 79; Craig v. Leslie, 3 Wheat. 563; Anstice v. Brown, 6 Pai. 448. But only by an alien friend; not by an alien enemy, 1 Redf. on Wills, 9; 1 Williams on Exrs. 12. Compare, as to devises of realty, on this point, *supra*, note 1.

[and their land escheats as a result of attainder[1]]. Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture. Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments (as usurers, libelers, and others of a worse stamp), by the common law their testaments may be good."[2]

Apart from the bearing of intermediate legislation in England, the statute 33 and 34 Vict. (1870), c. 23, establishes the law of that country on a new basis. For, subject to provisions concerning custody and employment of a felon's or traitor's property during his life, it abolishes attainder, corruption of blood, forfeiture, and escheat, for treason, felony, and *felo de se*. And inasmuch as these penalties constituted at the common law the only ground for testamentary incapacity arising from criminal conduct, that incapacity has now disappeared, together with the ground for its existence.[3] That such is the necessary result of such statutory changes has been expressly held in Kentucky, where, under laws abolishing attainder and forfeiture, probate was granted to a will of real and personal property executed by a murderer after his conviction and sentence to death.[4]

In this country the United States Constitution (art. III., sec. 3) provides that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[5] And it is further provided by the U. S. Revised

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[1] 1 Jarman on Wills, 42; Bac. Abr. "Wills," B.

[2] 2 Blackst. Comm. 499.

[3] 1 Jarm. on Wills 43 (4th English Ed.; Randolph & Tallcott's Am. Ed.). The statute is, however, by its terms made inapplicable to the then existing law of forfeiture consequent upon *outlawry*. Id. By the Act of 53 Geo. III., c. 127, providing that excommunication shall entail no civil incapacity whatever, any previous question concerning the testamentary rights of excommunicated persons was removed.

[4] Rankin v. Rankin, 6 T. B. Monr., 531, which see for a clear and valuable exposition.

[5] Concerning the meaning and scope of this constitutional provision, and of the confiscation act passed during the Civil War, see Wallach v. Van Riswick,

Statutes, sec. 5326, that "no conviction or judgment shall work corruption of blood or any forfeiture of estate."

The local provisions of a similar character vary somewhat in phraseology and in scope, and are to be found in the constitutions of some of the States[1] and in the statutes of others.[2]

V. MENTAL UNSOUNDNESS.

The statutes of wills usually require that the testator must be of "sound mind." This term calls for two things. In the first place, the mind must possess a certain degree of intelligence. What degree that is, we will consider in a moment. But in the second place, besides having the requisite degree of intelligence, it must be free from insane delusions which might affect the provisions of the will.

First, then, concerning the degree of intelligence required by law to enable a testator to make a valid will. On this point there has been much discussion, and it has been found impracticable to lay down any hard and fast definition that will answer for all cases. There is a general agreement,[3] however, that the testator must be able to summon before his mind,[4] on the same occasion, and hold there for a reasonable period, (*a*) the persons who might naturally be the objects of his bounty and his relations to them; and (*b*) the property he has to dispose of, and that (*c*) he must understand

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92 U. S. 202; Ill. Cent. R.R. Co. v. Bosworth, 133 U. S. 92, and cases there cited. Concerning treason against a State as distinguished from the national government, see N. Y. Penal Code, sec. 87; N. Y. Code Civ. Proc. 1977, 1982; People v. Lynch, 11 Johns. 549.

[1] For instance, Constitution of Penn., art. i., secs. 18 and 19.

[2] For instance, N. Y. Penal Code, sec. 710; N. Y. Code Crim. Proc., sec. 819.

[3] Lee's Case, 46 N. J. Eq. 193; Converse v. Converse, *post*, p. 25; Reichenbach v. Ruddach, 127 Penn. St. 564; Stoutenburgh v. Hopkins, 43 N. J. Eq. 577; Kramer v. Weinert, 81 Ala. 414; Prather v. McClelland, 76 Tex. 574 (13 S. W. Rep. 543); Bannister v. Jackson, 45 N. J. Eq. 702 (17 Atl. Rep. 692); Kerr v. Lunsford, 31 W. Va. 659 (8 S. E. Rep. 493); Clifton v. Clifton (N. J.), 21 Atl. Rep. 883; *In re* Blair's Will, 16 Daly, 540 (16 N. Y. Supp. 874); Spratt v. Spratt, 76 Mich. 384; Durham v. Smith, 120 Ind. 468; Chrisman v. Chrisman, 16 Ore. 127 (136); Brown v. Ward, 53 Md. 382 (396).

[4] He must be able to do so. It is not necessary to show that he did in fact do so. Brown v. Mitchell, 75 Tex. 9.

the scope and bearing of the provisions of the will.[1] If the testator can do this, he has *mind enough*, and this brings us to the second point above mentioned, namely, that that mind may nevertheless still be rendered unsound by the presence of insane delusions. If the mind is also free from insane delusions which might affect the provisions of the will, then it is a sound mind.

Such then, in brief, is the meaning of the statutory requirement that the testator must be of sound mind.[2] But in applying the requirement to the ever-varying and complex facts of actual cases, we encounter many serious perplexities. Contests over the question of testamentary capacity seldom arise unless there is some ground for imputing some degree of weakness or peculiarity. And the particular forms of mental and physical debility or eccentricity or derangement are so numerous as to give rise, in such contests, to an almost numberless multitude of single instances, each of which must be passed on by the court on its own merits. There are, it is true, marked cases of insanity or idiocy which are readily recognized and proved. But yet, between these and normally constituted and healthy minds, the gradations shade off by imperceptible degrees. And as each case arises, the question must always recur whether, on the given evidence and all the circumstances, the given instrument does actually represent the real will of a competent testator, and no automatic rule can be laid down which will

[1] In regard to the third requirement, there is one question to which attention should here be called. In New York, in the famous case of Delafield v. Parish, 25 N. Y. 10 (97), a majority of the court agreed that the question in each case is whether the testator had sufficient capacity to make *a* will, and not whether he had capacity to make *the* particular will produced. "If *compos mentis*, he can make any will, however complicated; if *non compos mentis*, he can make no will—not the simplest." An opposite view is, that the scope and bearing of the particular will should be taken into consideration in deciding whether the given testator was mentally competent to make that will. And this latter is the generally accepted, and is certainly the most reasonable, doctrine. Harrison v. Rowan, 3 Wash. C. C. 585; St. Leger's Appeal, 34 Conn. 434; *In re* Silverthorn, 68 Wis. 372 (32 N. W. Rep. 287). "We have also given sanction to the doctrine that a man may not be competent to make a will of one kind, owing to the nature and extent of the estate, when he may be competent to make one less complicated." Campbell v. Campbell, 130 Ill. 466 (480). And so also now, apparently, in New York; Van Guysling v. Van Kuren, 35 N. Y. 70 (74); Horn v. Pullman, 72 N. Y. 269 (276).

[2] Sometimes the statute calls for sound mind *and memory*, or sound mind, memory, and understanding. The meaning is the same.

not call for constant modification, qualification, and adaptation to the new facts of each new case.

But nevertheless the actual cases do range themselves in certain broad classes, to each of which has gradually been assigned its own distinct set of general rules, logically adapted to the leading characteristics of each class. These several classes or kinds of mental incompetency to make a will, and the boundaries and rules of each, we are now to examine. To be useful, the division must be made on a practical basis, according to broad, general lines, and it is believed that the following arrangement will be found most convenient.

In the first place, then, in judging of testamentary capacity, both the body and the mind should be considered,—the mind, because its "soundness" is the very point in question; the body, only because of the light its condition often throws upon the state of the mind. The mere fact that the testator is physically weak, disordered, maimed, or deformed is, *in itself*, of no importance, except as it may go to show, in the particular instance, a resulting or accompanying absence, weakness, or derangement of mind. Thus, a man may make a valid will though blind,[1] or deaf,[2] or dumb,[3] or exceedingly weak and feeble in body;[3] so though he is extremely old.[4] For though one may be too young to make a will, he cannot be too old, if only he retains a "sound mind." In cases where the body is feeble, deranged, or deficient in any of its parts or functions, as for instance where testator is blind, deaf, or dumb, this fact may call for greater care in making sure that the mind was nevertheless sufficiently clear and strong, and that the testator's own will

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[1] Ray v. Hill, 3 Strobh. (S. Car.) 297; In Goods of Piercy, 1 Roberts. 278; *In re* Mullen, 5 Irish Eq. 309: Wilson v. Mitchell, 101 Penn. St. 495 (503).

[2] *In re* Geale, 3 Sw. & Tr. 430. See Goods of Owston, 2 Sw. & Tr. 461.

[3] Hathorn v. King, 3 Mass. 371; Horn v. Pullman, 72 N. Y. 269; Stoutenburgh v. Hopkins, 43 N. J. Eq. 577; Hoskins v. Hoskins (Ky.), (7 S. W. Rep. 546); Kerr v. Lunsford, 31 W. Va. 659 (8 S. E. Rep. 493); Chrisman v. Chrisman, 16 Ore. 127; Patterson's Will, 13 N. Y. Supp. 463.

[4] Collins v. Townley, 21 N. J. Eq. 353; Wilson v. Mitchell, 101 Penn. St. 495; Van Alst v. Hunter, 5 Johns. Ch. 148 (158); Horn v. Pullman, 72 N. Y. 269; Snelling's Will, 17 N. Y. Supp. 633; Clearwater's Will, 2 N. Y. Supp. 99; Napfle's Estate, 134 Penn. St. 492; Appeal of Richmond, 59 Conn. 226; White v. Starr, 47 N. J. Eq. 244.

is really expressed in the instrument.[1] But this is a question of evidence. So much in general for the body. The cases of mental incompetency of testators may, for purposes of practical convenience, be best divided into classes, as follows:

IDIOCY.

First, a broad field is covered by the term idiocy.[2] This condition results from arrested mental development, and is generally said to be determined by a child's condition at birth. But development is sometimes arrested after birth, in very young children, and the result, at least from our present point of view, is the same. So, also, it is not unknown that accident or violent grief may sometimes so affect the mind as to cause not derangement but decay, and bring it finally to a condition very similar to idiocy. There are degrees of idiocy,[3] but no person properly classified as an idiot can make a valid will.[4] But mere weakness of mind, whether natural or produced by prostration or decay, will not incapacitate a testator,[4] so long as his mind satisfies the test already set forth. For as Swinburne says:[5] "If a man be of a mean understanding (neither of the wise sort nor the foolish), but indifferent, as it were, betwixt a wise man and a fool, yea, though he rather incline to the foolish sort, so that for his dull capacity he might worthily be termed *grossum caput*, a dull pate, or a dunce, such an one is not prohibited from making his testament."

INSANITY—LUNACY.

In another important class of cases minds once rational have become deranged, either from accident, or sickness, or grief, or the development of some hidden tendency, or otherwise, and are subject to "delusions," *i.e.*, they believe things to exist which have no real existence, and are incapable of being permanently reasoned out of such erroneous belief. Concerning the delusions which affect the minds of the insane, it is said in the opinion in Dew v. Clark:[6]

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[1] *In re* Geale, 3 Sw. & Tr. 430; Longchamps v. Fish, 2 B. & P. (New Rep.) 415; Weir v. Fitzgerald, 2 Bradf. (N. Y.) 42.

[2] An idiot is a person who has been without understanding from his nativity; a natural fool; a natural. Bouvier's Law Dict.; Worcester's Dictionary.

[3] Townsend v. Bogart, 5 Redf. 109.

[4] Hathorn v. King, 8 Mass. 371.

[5] Pt. 2, S. 4, pl. 8.

[6] 3 Addams, at 90.

"The true criterion—the true test of the absence or presence of insanity, I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely—*delusion*. Wherever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being *permanently*, reasoned out of that conception, such a person is said to be under a delusion, in a peculiar, half-technical, sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of absent or present insanity."[1]

Sometimes in the case of persons afflicted with insanity, this presence of delusions is their permanent and settled condition, while sometimes, on the other hand, they are subject to what are known as "lucid intervals," *i.e.*, intermittent periods when the mind breaks away from its delusions, and for the time being acts in a rational and normal manner. The word lunatic is derived from this fact, on account of some supposed connection between these intervals and the periodic lunar changes. But the term lunacy is very commonly applied to all forms of insanity without reference to the special nature of the malady. Now, in all these cases the one vital question is, whether the will in hand was made during a lucid interval. An insane person belonging to the classes thus far described cannot make a will at all, except during a lucid interval. His insanity and its attendant incapacity, once proved, are presumed to continue.[2] But the existence of a lucid interval at the time of

[1] Approved and followed in Am. Seamen's Friend Soc'y v. Hopper, 33 N. Y. 619 (624); Boughton v. Knight, L. R. 3 P. & D. 64; Potter v. Jones, 20 Ore. 239; see Barbo v. Rider, 67 Wis. 600. If there is any apparent, even though entirely insufficient, cause for a delusion, then testator's belief may only show poor judgment and defective reasoning power, and not insanity. *In re* Coles' Will, 49 Wis. 181; Potter v. Jones, 20 Ore. 239; Middleditch v. Williams, 45 N. J. Eq. 726; Clapp v. Fullerton, 34 N. Y. 190 (197).

[2] White v. Driver, 1 Phill. 84; Cartwright v. Cartwright, 1 Phill. 90; Reichenbach v. Ruddach, 127 Penn. St. 564; Stevens v. Stevens, 127 Ind. 560. No such presumption exists where the insanity arises from a merely temporary cause, as fever. It is proper to here call attention to a divergence of views on an allied question,—namely, the nature and weight of the burden imposed on every proponent concerning proof of testator's mental soundness. The apparent, and to some extent real, conflict among the authori-

making the will may be shown by affirmative proof,[1] and thereupon the presumption of continuing incapacity at that time is rebutted, and the objection on that ground is removed. Therefore it is presumptive but not conclusive evidence of incapacity that the testator was unquestionably a lunatic, and that he was, at the time of making the will, confined in an asylum. For if he made it during a lucid interval, and his mental condition for the time being also satisfied the test already stated (p. 12, *ante*), it is sufficient.[2]

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ties on this point appears to arise from the fact that there are two separate rules to be considered: first, that the law presumes every one to be of sound mind until the contrary is shown; and second, that the burden of proving the will is on the proponent. In some States it is held that the proponent need only prove, in the first instance, the due formal execution of the will, and that then it is open to the contestant to show incapacity, and to the proponent to offer affirmative proof of mental soundness in rebuttal. Higgins v. Carlton, 28 Md. 115 (141). In others, the proponent is expected to offer some outside affirmative proof of testator's mental soundness to start with. Knox's Appeal, 26 Conn. 25.

In the former class of cases the true ground of decision appears to be not that the *prima facie* presumption of mental soundness dispenses with all preliminary proof of the fact, and relieves the proponent of his admitted burden; but that the mere showing of due formal execution of an apparently rational will constitutes such preliminary proof, and contributes to the material necessary to set the presumption going. While in the second class of cases the existence of the presumption is not denied, but it is held that it is not set in motion without some further (though slight) preliminary proof that the circumstances at the time of execution were such as to indicate that the case in question was of the usual character falling within the scope of the presumption. The true *general* rule would appear to be that, taking the proceeding for probate as a whole, the proponent must throughout see to it that the preponderance of evidence of some sort is in favor of the usual presumption and such as will justify the court in assuming the requisite soundness of mind, and that it is only the question of just what shall be sufficient for that purpose that is generally in dispute. Todd v. Rennick, 13 Colo. 546. For the general rules see Brown v. Ward, 53 Md. 395; Elkinton v. Brick, 44 N. J. Eq. 158; McCoon v. Allen, 45 N. J. Eq. 708; Kerr v. Lunsford, 31 W. Va. 659. *In re* Silverthorn, 68 Wis. 372; McCulloch v. Campbell, 49 Ark. 367; Allen v. Griffin (Wis.), 69 Wis. 529; Kennedy v. Upshaw, 66 Tex. 442; *In re* Layman's Will, 40 Minn. 371.

[1] White v. Driver, 1 Phill. 84; Dew v. Clark, 3 Addams, 79; Boughton v. Knight, L. R. 3 P. & D. 64 (76). Even a formal finding of insanity after inquest may be rebutted by proof of a lucid interval at the time in question. Titlow v. Titlow, 54 Penn. St. 216.

[2] Nichols v. Binns, 1 Sw. & Tr. 239. The fact that after making his will testator committed suicide, is admissible as evidence on the question of his sanity, but is by no means conclusive. Burkhart v. Gladish, 128 Ind. 337; Card's Will, 8 N. Y. Supp. 297; Chambers v. Queen's Proctor, 2 Curt. 415.

INSANITY—MONOMANIA.

There is a still farther large class of insane persons, known as *monomaniacs*, who, as the term indicates, are deranged in some one direction, though sane in others. They are subject to "delusions" like the other class of insane persons just considered, but these delusions are confined within a restricted field. Concerning the capacity of monomaniacs to make their wills, there has been in the past much discussion and divergence of opinion. The difficulty appears to have arisen chiefly out of the phrase "partial insanity," which was once commonly employed to designate the condition of persons known as monomaniacs. On one side it was contended that the mind was a unit, and that it could not fairly be said that one part of it could be unsound and another part sound.[1] On the other side attention was called to the undoubted fact that, in spite of all theories, many persons obviously insane on certain subjects were perfectly and uninterruptedly sane on all other matters.[2]

This question may now be regarded as at rest,[3] and it is settled that the mere existence of a monomania does not necessarily invalidate the will. And here arises an important distinction peculiar to these and similar cases. For if the insane delusion is of such a character that it may have occasioned the provisions of the will, it is fatal to the validity of the instrument,[4] while if it relates to some subject wholly disconnected from those provisions, and did not occasion them, and is a monomania, not involving a diseased condition of the mind on other subjects, it does not invalidate the will.[5]

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[1] Waring v. Waring, 6 Moore P. C. 341; Smith v. Tebbitt, L. R. 1 P. & D. 398.

[2] See Dunham's Appeal, 27 Conn. 192.

[3] Banks v. Goodfellow, L. R. 5 Q. B. 349; Boughton v. Knight, L. R. 3 P. & D. 64.

[4] Dew v. Clark, 3 Add. 79; Vance v. Upson, 66 Tex. 476; Smee v. Smee, 5 P. D. 84; Boughton v. Knight, L. R. 3 P. & D. 64.

[5] Banks v. Goodfellow, L. R. 5 Q. B. 549; Murfett v. Smith, 12 P.D. 116; Society v. Price, 115 Ill. 623; White's Will, 121 N. Y. 406; Middleditch v. Williams, 45 N. J. Eq. 726; Durham v. Smith, 120 Ind. 463.

Illustrations.

(*a*). The mind of John Banks, the testator, had long been disturbed by two delusions, the one that he was pursued by spirits, the other that a certain Featherstone Alexander, a man long since dead, came personally to molest him. Neither of these delusions—the dead man not having been in any way connected with him—had, or could have had, any influence upon him in making the will in question. *Held*, that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it is such as was calculated to influence the testator in making it.[1]

(*b*). The testator became subject to a delusion that he was a son of King George IV., and addressed to Queen Victoria a memorial on that subject which gives conclusive evidence of insanity. By his will he left his property to his wife for life, and after her death to found a free public library for the use of the people of Brighton, a place in which George IV. had taken a deep interest. He also labored under a delusion that he had been defrauded by his brother, and he made no provision for him by his will. The will was held invalid.[2]

(*c*). The testatrix believed herself a member of the Trinity—that she was the Holy Ghost, and a Mr. Simms Smith was the Father. She believed that epidemic diseases came through her agency. "God said, 'Turn on the screw,' and the cholera came; 'Turn it again,' and it ceased." The court say that there were clear traces of submission to the will of a beneficiary—Mr. Simms Smith—apparently founded on the special subject of her hallucinations, for which the external and visible relations of the parties could hardly account. The will was held invalid.[3]

DEMENTIA.

Still another class includes cases of mere weakening or decay of the mind. The term applied here is *dementia*,—the mind fading

[1] Banks v. Goodfellow, L. R. 5 Q. B. 549.

[2] Smee v. Smee, 5 P. D. 84.

[3] Smith v. Tebbitt, L. R. 1 P. & D. 398; the opinion in this case, however, states the old and now obsolete rule that the existence of any insane delusion renders the whole mind unsound.

or dying away. Very commonly, though not always, this condition is due to old age, and is then known as *senile dementia*. And here it is difficult, in many actual instances, to determine whether or not a given testator has yet reached or already passed the point where he had sufficient mental power to satisfy the test already given (p. 12, *ante*). As stated above, this dementia may progress so far as to bring the testator practically to a condition of idiocy.

DELIRIUM—DRUNKENNESS.

In addition to idiocy, and lunacy with or without lucid intervals, and monomania, and dementia, we find still other classes. One of these is "delirium" due to fever or other disease, sometimes temporary and sometimes continuing and developing into permanent insanity.[1] Lucid intervals are here to be found, and during their continuance, but not otherwise, the patient may be able to make a valid will.[2]

Analogous to these cases are those of persons either usually, or at the time of executing the instrument, under the influence of liquor, or otherwise deprived to a greater or less degree, by artificial means, of full consciousness and understanding of their own acts. It is well known that excessive and long continued use of certain liquors or drugs may ultimately produce a chronic disease affecting the mind and the will.[3] Obviously such a disease may render a testator mentally incompetent. For it is the *fact* of mental debility or derangement, and not the *cause* of it, that is the vital point in determining testamentary capacity. But apart from such a resulting condition of mental disease, the distinction to be observed in this class of cases is whether the testator, *at the time* of making the will, was or was not deprived of the faculties requisite to qualify him for the testamentary act. He might be shown to be a hard and confirmed drinker, frequently or even constantly intoxicated, and yet if, at the particular time in question, he was sufficiently free from the influence of liquor to know clearly what he was about, and to otherwise satisfy the usual test, then proof of his habits would

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[1] Keithley v. Stafford, 126 Ill. 507.

[2] As to the presumption of continued incapacity from this cause, see 1 Jarm. on Wills (Randolph & T.'s Ed.), 97, note C.

[3] Reichenbach v. Ruddach, 127 Penn. St. 564.

not invalidate the will.[1] While if it were shown that even although usually temperate, he was, at that time, so far under the influence of liquor as not to satisfy the usual test of capacity, then the will could not stand. And here we may notice a distinction between cases of settled insanity and those of derangement or stupefaction accompanying or occasioned by drunkenness, fever, or other merely temporary cause. For when the existence of insanity has once been proved, we have already seen that a presumption of its continuance is naturally raised, and the burden of proving that the will was made during a lucid interval rests on the party setting it up.[2] But if the insanity shown arose merely in connection with fever or other transient cause, the ground for assuming continued insanity fails, and it must be affirmatively proved to have existed at the time in question.[3] Under this latter head fall cases of temporary insanity induced by excessive drinking. For no presumption of perpetual intoxication and consequent permanent deprivation of reason arises from proof of frequent, or habitual, or excessive use of liquors. No one is intoxicated all the time. And he who alleges incompetency from such a cause must prove not only that testator was usually intoxicated, but that he was so in fact at the very time the will was made.[4] In the case of permanent insanity produced by drink, however, the other and usual rule applies.

Illustration.

Robert L. Peck, the testator, was of intemperate habits. For five days before July 23d, when he made his will, he had been "on a spree," and continued to drink on that day, and he also used coarse and profane language, but was not shown to have been, at the time, irrational. The will itself was sensible. The will was sustained. Peck v. Cary, 27 N. Y. 9.

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[1] Peck v. Cary, 27 N. Y. 9 (20); *In re* Levis's Estate, 140 Penn. St. 179; Lee's Case, 46 N. J. Eq. 193; Elkinton v. Brick, 44 N. J. Eq. 154; Appeal of Harmony Lodge, 127 Penn. St. 269; Frost v. Wheeler, 43 N. J. Eq. 573; *In re* Peck's Will, 17 N. Y. Supp. 248.

[2] See *ante*, p. 16.

[3] Hix v. Whittemore, 4 Met. 545; Townsend v. Townsend, 7 Gill. (Md.) 10; Staples v. Wellington, 58 Me. 453; Blake v. Rourke, 74 Ia. 519; Brown v. Ward, 53 Md. 396.

[4] Ayrey v. Hill, 2 Add. 206 (210); Andress v. Weller, 2 Green Ch. (N. J.) at 608; Lee's Case, 46 N. J. Eq. 193.

We have thus stated the general groups in which the courts have for practical convenience classed the cases of persons mentally incompetent to make wills, and have called attention to the rules applicable to each. It remains here to state certain broad principles laid down by the courts and applicable generally to all cases where unsoundness of mind is set up.

1. The court may consider the instrument itself, and its provisions, to see whether they throw any light themselves on the mental condition of the testator.[1] It is obvious that a mere reading of the will might be proof sufficient of an insane mind; and so it might contain certain provisions so far "sounding to folly" as to suggest grave doubts.[2] And on the other hand, it might be so prudent, sensible, and logical as to bespeak a calm and rational mind in its author, and to constitute one point in its own favor.[3] As the saying is, "a rational act, rationally done," is evidence of a rational mind behind the act.[4]

But it still must be remembered that the fact that the instrument is rational in its provisions is very far from being conclusive of the competency of the testator. It is one important point for consideration.[5] And on the other hand, the fact that the provisions of the will are queer, unusual, or extraordinary does not necessarily show insanity.

Illustrations.

(*a*). For a rational testamentary act rationally done by a lunatic, see Cartwright v. Cartwright, *post.*

(*b*). The Reverend Robert Hoadly-Ashe, rector of Misterton, and of Crewkerne, who had preached and performed the other duties of his office for many years, on December 14, 1824, made this will:

"I promise & Swear that I will give all my Plate—Watch and Seals—Rings and all that I have in the world—at my decease—

[1] Cartwright v. Cartwright, 1 Phill. 90, as explained in Chambers v. Queen's Proctor, 2 Curt. 447.

[2] Arbery v. Ashe, 1 Hagg. 214.

[3] Boughton v. Knight, L. R. 3 P. & D. 64, and cases cited in next note.

[4] Cartwright v. Cartwright, 1 Phill. 90 (explained in Chambers v. Queen's Proctor, 2 Curt. 447); Nichols v. Binns, 1 Sw. & Tr. 239; Peck v. Cary, 27 N.Y. 9; Gombault v. Public Adm'r, 4 Bradf. 226 (234); Boughton v. Knight, L. R. 3 P. & D. 64.

[5] Bannatyne v. Bannatyne, 2 Roberts. 472.

I promise & Swear that I will give Elizabeth Arbery—at my Decease—all that I have in this world or ever shall have in wtaver in money or lands— "ROBT. HOADLY—ASHE, D.D."

Witness our hands, { ELIZABETH CLEAL, MARTHA RENDELL.

Dec. 14, 1824.

Sir John Nichol, in the judgment, says: "A paper, couched in these strange terms, and written in this strange manner, coming from a person of education, raises a great doubt whether it could have been the offspring of his mind when sound. . . . . The whole tenor and shape of the paper very strongly 'sounds to folly.'" And he recommends an arrangement out of court.[1]

(*c*). A had been clearly disordered in his mind for a length of time. He goes to Little Hampton to bathe in the sea, and there he sees a young woman at the house where he boarded, of whom he had no prior knowledge, and wants to marry her, at a time when he is insane. He is brought up to town in a strait waistcoat, and there afterwards writes a paper by way of codicil giving her a legacy. This was a delusion. The codicil was on its face as rationally done as in Cartwright v. Cartwright,[2] but the act itself was not a rational act.[3]

(*d*). Testator directed that part of his bowels should be made into fiddle strings, and others sublimed into smelling salts, and the rest of his body vitrified into lenses, explaining that he had an aversion to funeral pomp, and wished his body to be made useful to mankind. The will was sustained.[4]

(*e*). An Englishman who had lived many years in India, and had at different times expressed himself a believer in the Hindoo and in the Mohammedan faiths, and who had to a great degree adopted the habits of life of the latter, provided by his will for the erection of a cenotaph at Constantinople, with a light burning, and a description of the testator engraved thereon. This will was sustained, apparently as being rational in view of the history and opinions of the testator.[5]

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[1] Arbery v. Ashe, 1 Hagg. (Eccl.) 214.

[2] Given *post*.

[3] Clark v. Lear, stated in opinion in Cartwright v. Cartwright, 1 Phill. 90 (119).

[4] Morgan v. Boys, Taylor, Med. Jurispr., 2d (Amer.) ed. 555.

[5] Austen v. Graham, 8 Moore, P. C. 493.

2. Testators may, if mentally competent, dispose of their property as they see fit. They may be capricious, harsh, and even cruel in their scheme of disposition, and this mere fact will not invalidate the will.[1] No testator is bound to act kindly or even justly or equitably in making his will.[2] But though this is true, yet evidence of cruelty or harshness may obviously be carried so far as to suggest or even to prove insanity as their necessary source.[3]

3. The fact that testator himself was odd or eccentric, or entertained queer, unusual, or even extraordinary views or beliefs, does not necessarily involve testamentary incapacity.[4] The essential question is, first, whether his views were the result of insane delusion, as already defined, and, if so, whether they were or might have been influential factors in determining the provisions of the will according to principles already discussed.

Illustrations.

Insanity is not necessarily involved in testator's belief, for example, in

(*a*). Witches,[5]

(*b*). Ghosts,[6]

(*c*). "Spiritualism,"[7]

(*d*). Metempsychosis.[8]

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[1] Horn v. Pullman, 72 N. Y. 269; Brown v. Ward, 53 Md. 376 (392), as to which see note to Merrill v. Rolston, given *post;* see Boughton v. Knight, L. R. 3 P. & D. 64; Dew v. Clark, 3 Add. 90; Snider v. Burks (Ala.), 4 So. Rep. 225; Potter v. Jones, 20 Ore. 239; Middleditch v. Williams, 45 N. J. Eq. 726; Foster's Estate, 142 Penn. St. 62.

[2] Hoerth v. Zable (Ky.), 17 S. W. Rep. 360.

[3] Merrill v. Rolston, 5 Redf. 220; Dew v. Clark, 3 Addams, 90; Matter of Budlong, 126 N.Y. 423.

[4] Bull v. Wheeler, 6 Dem. (N.Y.) 123; Merriam's Will, 16 N.Y. Supp. 738.

[5] Leech v. Leech, 5 Clark (Pa.) 86; affi'd 9 Harr. 67; Addington v. Wilson, 5 Ind. 137; Lee v. Lee, 4 M'Cord (S. Car.) 183; Schildnecht v. Rompf. (Ky.), 4 S. W. Rep. 235.

[6] Thompson v. Thompson, 21 Barb. 107.

[7] Robinson v. Adams, 62 Me. 369; Will of Smith, 52 Wis. 543; Otto v. Doty, 61 Ia. 23; Keeler's Will, 3 N.Y. Supp. 629; Middleditch v. Williams, 45 N. J. Eq. 726; Brown v. Ward, 53 Md. 376, 396. But there may be such subjection to the medium's influence as to constitute undue influence. Thompson v. Hawks, 14 Fed. R. 902.

[8] Bonard's Will, 16 Abb. Pr. (N. S.) 128.

DEGREE OF INTELLIGENCE REQUIRED.

Executor of Hamblin Converse v. Erastus Converse.

SUPREME COURT OF VERMONT, 1849.

(21 Vt. 168.)

Appeal from a decree of the probate court, allowing the will of Hamblin Converse. Trial by Jury, December Term, 1848. *Bennett*, J., presiding.

The court, at the trial, among other things not objected to, instructed the jury that the validity of the will in question must depend upon the fact, whether the testator had sufficient mental capacity to execute it at the time it was executed; and that, to give it effect, he must then have been of sound disposing mind; but that this did not in any way imply that the powers of the mind must not have been weakened or impaired by disease or old age; and in regard to the degree of capacity, which the jury must be satisfied the testator possessed at the time of making the will, the court told the jury, that it would not be sufficient that he might be able to comprehend and understand a question which might be propounded to him, and answer it in a rational manner; nor was it necessary that he should have such a capacity of mind as would justify his engaging in complex and intricate business; but that the jury must be satisfied, in order to justify them in establishing the will, that the testator, when he made it, was capable of knowing and understanding the nature of the business he was then engaged in, and the elements of which the will was composed, and the disposition of his property, as therein provided for, both as to the property he meant to dispose of by his will, and the persons to whom he meant to convey it, and the manner in which it was to be distributed between them; and that, if they found all this, it should be found that he had sufficient capacity to make the will in question, but otherwise not.

The jury returned a verdict establishing the will. Exceptions.

The opinion of the court, on appeal, was delivered by

Redfield, J. The subject involved in this case is one of some difficulty. It is not easy to lay down any precise rule, as to what

exact amount of mental capacity is sufficient to enable one to dispose of property by will. The rule laid down by the judge in this case, in summing up to the jury, seems to have been rather a medium one, rather sensible and judicious; and if we reversed the judgment, we could hardly expect to prescribe a safer or more intelligible one. Every man will have his own mode of expressing the thing. The rule of one is very little guide to another.

I have myself usually told a jury, in these cases, that less mind is ordinarily requisite to make a will than a contract of sale, understandingly, for the reason that in contracts of sale there are usually two parties, and some degree of antagonism between their interests and efforts; so that here mind is opposed to mind, and consequently it is somewhat more difficult to see clearly the just bearing of all the relations presented than under the common circumstances of making a will, where one is free to act upon his own perceptions merely. But this is not always the case in making a will. One may be beset by an army of harpies in the shape of hungry expectants for property, altogether more perplexing than the ordinary circumstances attending a disposition of property by sale.

But it may be safe, no doubt, to affirm that, in making any contract understandingly, one must have something more than mere *passive* memory remaining. He must undoubtedly retain sufficient *active memory* to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in relation to them. The elements of such a judgment should be the number of his children, their deserts, with reference to conduct and capacity, as well as need, and what he had before done for them, relatively to each other, and the amount and condition of his property, with some other things perhaps. The capability of men in health to form correct judgment in such matters is no doubt very unequal, and, when there is no inherent incongruity in the will itself, and no just ground to suspect improper influence, juries are, and perhaps should be, very liberal in sustaining testamentary dispositions. But there must undoubtedly be some limit. When one is confessedly in a condition to be constantly liable to commit the most ludicrous mistakes

in regard to the most simple and familiar subjects, he ought not to and cannot make a will.

Judgment affirmed.[1]

BLIND TESTATOR.

Silas Ray et al. v. Hill & Archer, Ex'rs of Calvert.

South Carolina Court of Appeals, 1848.

(3 Strobh. L. 297.)

Probate of Will.

It appeared by the testimony that at the time of executing the will testator was blind. From a verdict establishing the will, the contestants appealed, and made this motion for a new trial.

Evans, J., delivered the opinion of the Court:

"The questions argued in this case are: 1st. Can a blind man make a will? [The other questions, which relate to the due execution of the will, are immaterial here.]

"1. It may be true, as stated in the argument by the appellant's counsel, that there is no reported case in which it has been decided that a blind man may make a will, but the proposition is affirmed in all the elementary writers, and wherever spoken of is assumed as an undeniable fact. In *Williams on Executors*, 16, it is said a 'blind man may make a will, but certainly there is more difficulty in proving the requisites of the statute than in the case of one who can see.' In the case of *Neil* v. *Neil* [1 Leigh (Va.) 6], and in our own case of *Reynolds* v. *Reynolds* [1 Speers L. 253], the fact that a blind man may make a will is assumed, and referred to as illustrating the meaning of the requirement of the statute that the will must be attested and subscribed in the presence of the testator. This class of persons are not excepted by the Act, as infants, *femes covert*, and persons *non compos mentis* are, unless they come within the last description, a proposition which I presume none will affirm. Even among those who are born blind, instances are not wanting of the highest degree of mental culture and attainment, even in those sciences where it would seem sight was of the greatest importance, and among those who have become blind from

[1] For a more elaborate statement of the required soundness of mind, see Boughton v. Knight, *post*. See also Lee's Case, 46 N. J. Eq. 193; also *ante*, p. 12, and cases cited.

disease or accident are to be found some of the greatest names in ancient or modern times. I think, therefore, we may safely conclude that it is settled law that mere blindness does not incapacitate a man from making a will, and if no adjudged case on the point is to be found it is because no one ever doubted it before."

[The court then consider the other questions raised—namely, whether the testator duly signed the will, and whether the witnesses subscribed it in his presence, and find on both points in the affirmative.]

All concur. Motion denied.

BLIND TESTATOR—PROOF OF EXECUTION.

Longchamp on the Demise of Goodfellow v. Fish.

ENGLISH COURT OF COMMON PLEAS, 1807.

(5 B. & P. 415.)

Ejectment. Verdict for lessor of plaintiff, sustaining the will.

On a former day in this term a rule *nisi* for setting aside the verdict, and having a new trial, was obtained by *Shepherd*, Serjt., on the ground that, the testator being blind, the will should have been read over to him. It appeared that he had himself dictated the will two months before execution, and it was then read to him, but was not read at the time of execution.

Rooke, J. There is not the least imputation of fraud in this case; but the application made to us to set aside the will is founded on mere technical reasoning. Now, unless compelled so to do by the provisions of the statute, I never would set a will aside on mere technical reasoning. The statute only requires that the witnesses shall attest their having seen the testator sign the will, and that the witnesses in this case do attest. If a fair ground for presuming fraud were laid by the evidence, the circumstance of the testator being blind would most materially strengthen that presumption.

[The report also gives opinions to the same effect as that of *Rooke*, J., by *Heath*, J., and *Chambre*, J.]

Rule discharged.

EXTREME WEAKNESS.

Hathorn and others v. King.

MASSACHUSETTS SUPREME JUDICIAL COURT, 1811.

(8 Mass. 371.)

Appeal from decree allowing the last will of *Mary Norris*, deceased. Among the reasons of appeal, one was, that the deceased was not of sane mind at the time of executing the will, and on this an issue was formed to the country.

On trial it appeared that the scrivener was called in at 11 o'clock in the morning on the 21st of March, and received from testatrix directions as to preparing her will. She was then very ill, and continued sinking until 6 o'clock in the evening, when she executed the will, and at a quarter-past 8 o'clock the same evening expired. The reporter states the instructions of the court as follows:

"After the examination was finished the evidence was minutely summed up to the jury by *Sedgwick*, J., and the jury were instructed by him (*Sewell* and *Parker*, justices, expressly concurring), that if they should be of opinion that the testatrix, at the time of dictating the will, had sufficient discretion for that purpose, and that, at the time of executing the will, she was able to recollect the particulars which she had so dictated, they might find their verdict that she was of sound and disposing mind and memory at the time of executing the will. And they found accordingly; and the will was proved, approved, and allowed by the court."

EXTREME OLD AGE.

Collins v. Townley and Johnson.

NEW JERSEY PREROGATIVE COURT, 1871.

(21 N. J. Eq. 353.)

The Orphans' Court admitted to probate the will of Sarah Collins, deceased.

Appeal.

THE ORDINARY. The testatrix was ninety-eight years of age at the time she made the will in question. Upon an examination of the evidence this appears to be the only ground for filing a caveat against the probate of her will. No unsoundness or imbecility of

mind is shown of a kind that approaches to defect of testamentary capacity. Nor is there any proof of any fraud, circumvention, or undue influence in procuring the will. There is no ground to sustain the appeal against the admission of the will to probate.

The caveator is a son of testatrix; he resided not far from his mother, and knew her situation and capacity. More than one unsuccessful attempt to procure an inquisition of lunacy against her in the last years of her life had been made and failed. Of all this he had full knowledge. The will gave the bulk of the property of testatrix to one child, and very little to her other children; yet this child was a daughter, with whom she had lived for many years, and who had taken care of her before and after she acquired her property upon the death of her son Hugh.

There may exist sufficient reason for examining into the validity of a will made by a mother in favor of a daughter with whom she has lived for years, especially when the testatrix is of the age of Mrs. Collins. Her other children have the right to require that it be clearly proved that she executed the will, understanding that it was her testamentary act. When they go beyond this, and continue litigation by a protracted inquiry into the capacity of the testatrix, it is in the discretion of the court to award costs against them, or to refuse any allowance of costs, as they think the conduct of the contestants may justify by the evidence in the case. The Orphans' Court were of opinion that sufficient reason for continuing the contest did not appear, and therefore refused to allow costs. I concur in that opinion, and therefore affirm the decree in that particular also.

(The ordinary here discusses and approves the disposition of the matter of costs below.)

The proceedings in the Orphans' Court are in all things affirmed.

DEAF-AND-DUMB TESTATOR.—INSUFFICIENT PROOF.

In the Goods of Francis Owston (deceased), on Motion.

ENGLISH COURT OF PROBATE, 1862.

(2 Sw. & Tr. 461.)

Francis Owston, a labourer, who died on the 6th of January, 1862, was deaf and dumb, and could neither read nor write.

On the 7th of January, 1857, he sent for Robert Bradley, an acquaintance of forty years' standing, who was able to communicate with him by signs and motions, to assist him in making his will. On the motion for probate, affidavits were offered setting forth that testator then informed said Bradley of his wishes by signs and motions perfectly understood by both of them; that Norwood Lawson, since deceased, a school-master, was present, and wrote out the will according to these instructions; that it was then explained to testator by signs, and approved and signed by him; and that he afterwards acknowledged it before the witnesses and asked them to attest it, all by signs.

Dr. Spinks moved for probate of the will to be granted to Richard Mosey Owston, the sole executor named therein.

Sir C. CRESSWELL: This is a very singular case. Robert Bradley does not state the nature of the signs by which he communicated with the testator, whether he conversed with his fingers or not. It does not appear that he was habitually conversant with deaf-and-dumb people. I shall require a further affidavit of the nature of the signs and motions with which Bradley communicated with the deceased before I grant the motion. I should like, also, to have the consent of the party entitled in the event of intestacy. Let the motion stand over.

Dr. Spinks renewed the motion on the following further affidavit of Robert Bradley: "That my late father was the occupier of a farm at Thorneholme, in the county of York, comprising about 400 acres of land, for nineteen years, and after leaving that farm removed to Wetwang, in the same county, and occupied a farm there for eleven years, and that the said Francis Owston, the testator, who was deaf and dumb, was a labourer in the employment of my said father at Thornholme and Wetwang for a period of twenty-five years, namely, from the year 1814 to the year 1840, and during part of that period resided in the house of my said father. That the said testator used to take me to Burton Agnes School when I was a child, and from seeing him daily for upwards of twenty years, I learnt to converse with him by signs and motions, making letters on the palm of my hands, and by the deaf-and-dumb alphabet. That all my brothers and sisters could also understand and converse with him by signs and motions, but none of them so well as I could. That while the said testator was in the

employ of my said father, he (the said testator) taught me to plough, to shear sheep, and to play at whist, he being a very good whist-player. That I frequently sent him on numerous errands, and frequently sent him into my father's fields to fetch up a particular horse, and he has gone away alone and brought it back without any other means of information than the signs and motions which I had used. That when I marked with the finger on the palm of the hand the name of any person the said testator was acquainted with, he knew it directly, and would give me to understand that he did so by making signs indicative of the trade or business of such person. That the said testator could and did also converse with me by these signs and motions, and give me information as to my grandfather, and told me his age. That when I attended at the house of the said testator to interpret for him on the making of his will, as mentioned and set forth in my affidavit, sworn herein on the 12th of February, 1862, the said testator used both signs and letters on his hand; he made signs indicating that all his money, furniture, and everything he possessed was to be given to his nephew, Richard Mosey Owston, who was then present, and marked his said nephew's initials on his hand, putting his finger in his mouth, which was a sign that the person he referred to was a relation. The said Richard Mosey Owston had attended to the said testator's business matters for some time, and was present at the testator's request, and the testator pointed to him as the person he wished to have all his property. That the said testator had separate signs or marks for gold, silver, and copper; for gold he touched his neckerchief, silver his shirt, and copper the buttons of his coat. He used all these signs, touched most of the furniture, and gave me, by aid of the marks and signs, to understand they were all for his said nephew. When I replied to that effect, he understood at once, and expressed himself satisfied. That I am informed (and believe it to be true) that the only personal estate of which the said testator died possessed consisted of his household furniture (of trifling value) and the sum of £50 due on note." (Here follows a statement concerning testator's next of kin and his relations with them.)

Sir C. Cresswell: I cannot consider this as a sufficiently satisfactory account of the method in which the instructions of the deceased are said to have been taken. I am not inclined to let pro-

bate of this paper pass on motion, at least without the consent of the next of kin.

Motion rejected.

[Also Rollwagen v. Rollwagen, 63 N. Y. 504.]

DEAF-AND-DUMB TESTATOR.—SUFFICIENT PROOF.

In the Goods of Geale (deceased).

ENGLISH COURT OF PROBATE, 1864.

(3 Sw. & Tr. 431.)

John Geale, late of Vately, in the county of Hants, yeoman, died on the 25th of January, 1864, leaving a will of the 4th of July, 1861. He was deaf and dumb, and could neither read nor write, and had executed the will by mark.

Affidavits of Martha Geale, the deceased's widow, and of R. T. Dunning, a wine merchant, and Isaac Hilton, parish clerk, the attesting witnesses, were filed. They deposed that the deceased was shrewd and intelligent and possessed of considerable mechanical skill and ingenuity. The deponents had all known him intimately for more than thirty years, and he was in the habit of conversing with them and they with him by signs, which were well understood by all of them.

It appeared by affidavit that the will was drawn by a Mr. Sheppard, a solicitor, at the suggestion and request of testator, and according to testator's instructions. On the 4th of July, 1861, the attesting witnesses were sent for; the deceased then by signs told them that he was about to make his will and wished them to witness it. He then produced the will and told them by signs how he wished to dispose of his property. Dunning then read over the will and ascertained that it was in accordance with his instructions, and then by signs explained to the deceased its contents and effect, and he by signs signified his approval.

Dr. Spinks moved for probate on these affidavits, and cited *In the Goods of Owston*, 2 Sw. & Tr. 461 [given *ante*]. But Sir J. P. Wilde declined to grant the motion without further affidavits stating the nature of the signs used.

Dr. Spinks afterwards renewed the motion upon the joint affidavit of the widow and the attesting witnesses, which, in substance,

was as follows: "The signs by which deceased informed us that the will was the instrument which was to deal with his property after his death in case she survived him were in substance, so far as we are able to describe the same in writing, as follows, viz.: The said John Geale first pointed to himself, then he pointed to himself, then he laid the side of his head upon the palm of his right hand, with his eyes closed, and then lowered his right hand towards the ground, the palm of the same hand being upwards. These latter signs were the usual signs by which he referred to his own death or the decease of some one else. 2. He then touched his trousers pocket (which was the usual sign by which he referred to his money), then he looked all around and simultaneously raised his arms with a sweeping motion all around (which was the usual sign by which he referred to all his property or all things). 3. He then pointed to his wife, and afterwards touched the ring finger of his left hand, and then placed the right hand across his left arm at the elbow, which latter signs were the usual signs by which he referred to his wife." (Here follows a similar description of the particular signs employed by testator to indicate his further wishes.) "7. After the testator had, in the manner aforesaid, expressed to us what he intended to do by his said will, the said R. T. Dunning, by means of the beforementioned signs, and by other motions and signs by which we were accustomed to converse with him, informed the said testator what were the contents and effect of the said will."

Sir J. P. Wilde granted the motion, [apparently because the meaning assigned to the acts had a rational connection with them].

IDIOCY.—EFFECT OF SUBSEQUENT INQUISITION.

Townsend v. Bogart.

SURROGATE'S COURT, NEW YORK COUNTY, NEW YORK, 1881.

(5 Redf. 93.)

Application for probate of the will of Mary E. Hatfield, deceased, dated September 1, 1869.

It was alleged by the contestant, among other objections, that testatrix was not of sound mind. The will gave all her property to Ellen Bogart, her cousin. Decedent was unmarried, and at the

date of the will was about forty years old, and for the previous seven years had lived in the family of Anderson Bogart, the father of her cousin Ellen. A sister of testatrix was an inmate of an insane asylum. Testatrix was a member of a Methodist Church in New York City. She was able to do certain kinds of housework, and keep her room in order; could tell a good penny from a bad one, and a five-cent piece from a dime, but not a twenty-five from a fifty-cent piece; and could not tell time nor count her fingers; and in 1871, two years *after* the date of the will as the result of an inquiry by the Supreme Court, she had been duly declared an idiot. Other facts are stated in the portion of the opinion given below.

Calvin, S. (after stating the substance of the evidence, including additional facts similar to those above stated, and discussing a number of authorities, including Bundy v. McKnight, 48 Ind. 502).

In Bundy v. McKnight, above cited, the doctrine is, to my mind, best expressed, that the law does not undertake to test a person's intelligence, and define the exact quality of mind and memory which a testator must possess to authorize him to make a will, yet it does require him to possess a mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty; their deserts in reference to their conduct and treatment towards him, their capacity and necessities; that he shall have sufficient active memory to retain all those facts in his mind long enough to have his will prepared and executed; and if this amount of mental capacity is somewhat obscure or clouded, still the will may be sustained. (The Surrogate here discusses the term *non compos mentis*, and also the statutory provision concerning testamentary capacity.)

It is true that she appeared to recognize acquaintances, did certain routine domestic work, remembered her sister, and felt unkindly towards Mrs. Townsend for a reason which she seemed not to understand and to entirely misconceive, for she supposed that she had borrowed money of her and had not repaid it, while the fact was, that the borrowing was of decedent's mother, and her mind seemed to have been materially prejudiced against her sister on that account. It is true, also, that she attended Sunday-school and church, and went to familiar places alone, and made trifling purchases under the instructions of others; that she could repeat the Lord's Prayer, remember a text of the clergyman, and state some-

thing of what he said; that she stated she intended to give her property to her second cousin, and that her sister should not have it for reasons above stated, and because she had neglected her; and that she, after its execution, stated that she had made a will, thus disposing of her property, and that she went to the attorney who drew the will, and gave him instructions as to what she desired to do with her property.

Taking all these facts into consideration, with the other indisputable facts proved by witnesses on both sides, that though she attended school for three years she did not learn to read or write, never learned to count more than ten, could not tell the time of day from clock or watch, could not add or multiply, had no idea of the value of property, or of money beyond ten cents, could not tell where to go when she left the cars, and when she went out alone to familiar places on familiar streets, carried with her a card with her address, lest she should be lost, it being deemed necessary by her friends; that she was of weak mind, unable to do or attend to most things which most persons of ordinary mind and intelligence could do; that she was easily lost; could not reckon money; had no idea or understanding of the amount or the value of her property, the value or worth of anything,—it is quite apparent that her intellectual capacity was not equal to that of an ordinary intelligent child of ten years of age.

How can it be said that she had any intelligent understanding of the value of her property which she was disposing of by will, when she had no appreciation of values? That fact alone seems to indicate that she could not have known whether she was disposing of property worth five dollars or five millions.

It is very difficult to say that decedent was not laboring under an obvious delusion which affected her testamentary disposition in respect to her sister, Mrs. Townsend, unless she was mentally incapable of appreciating the difference between the obligation of that sister to her mother by reason of borrowing $2,000 and that to herself; and it is equally difficult to reconcile her will with an intelligent appreciation by her of the relation she bore to her sister, who was in the insane asylum, and her duty towards her, and her just claims upon her bounty.

The circumstance that she went to the attorney and gave instructions respecting her will is very materially weakened by the fact

that she was accompanied by Mr. Bogart and the devisee, and that the will was of the simplest character, and its terms easily fixed upon her mind by a little tutoring.

These circumstances, aside from the proceedings in idiocy, seem to me to forbid the admission of this will to probate, but when taken in conjunction with those proceedings and their result, though they are obviously neither conclusive nor binding upon this court in the determination of this case, it seems to be impossible to escape the conviction that decedent, when she made this instrument, was not possessed of sufficient mental capacity to understand the effect of the disposition and the condition or value of her property, or the just claims of her sisters upon her bounty. For be it remembered that these proceedings were substantially sustained by the testimony of Mr. Bogart and one of his daughters, and that all the efforts to explain and escape the force of the testimony on the ground that they did not understand the nature of the proceedings and its purpose, in no way controvert the facts to which they testified; and the effort to belittle the significance of that adjudication on account of Dr. Warner not being present, and the hasty disposition of the case, signally fails, for the testimony of Mr. Boese, one of the commissioners, and that of Mr. Man, an experienced and intelligent lawyer, who made a careful examination of the decedent before the proceedings were taken, and had two interviews, show that the proceedings were conducted with proper precaution, and leave no doubt in my mind that the finding of the jury was in accordance with the facts.

If this were a case of lunacy it might very well be that the inquisition in lunacy, two years after the execution of the will in question, might not be very significant, for the reason that lunacy might be the result of disease or sudden accident, or development of hereditary mental taint; but the imbecility of mind which was manifested in the case of the decedent was not one of sudden development, and some of the proponent's witnesses indicate that, in their opinion, after the death of her mother and under the care of the Bogart family, she improved in her mental condition, and its manifestation; and I am of the opinion that, if the decedent was an idiot when the inquisition was had, it is impossible, on the proof in this case and from the nature of the affliction, that she could have been of sound and disposing mind when this instrument was executed.

I am of the opinion that, from the proof in this case, decedent was not of sound and disposing mind when she executed the instrument propounded, and that for that reason the will should be denied probate.

Decreed accordingly.

INSANE DELUSIONS.

Boughton and Marston v. Knight and Others.

ENGLISH COURT OF PROBATE, 1873.

(L. R. 3 P. & D. 64.)

The plaintiffs, Sir Charles Boughton and Mr. Marston, propounded the will of John Knight, of Henley Hall, Shropshire, dated the 27th of January, 1869. The deceased died on the 7th of September, 1872. The defendants, the sons of the deceased, pleaded that the deceased was not of sound mind, memory, and understanding on the 27th of January, 1869, the day the will bears date. Issue was joined on this plea. The property of the deceased consisted of the Henley Hall estate, the net rental value of which was £1,500 per annum, and personalty to the value of £62,000. By the will propounded Sir Charles Boughton and his sons were the devisees of the whole real estate; the testator's son, James Thomas, had a legacy of £8,000, his son Charles £7,000, and John a life interest in £10,000. The children of his deceased daughter, Henrietta Kent, were not mentioned in the will.

The trial extended over fourteen days in March, 1872, before Sir J. Hannen and a special jury.

March 31. Sir J. Hannen, in summing up, made the following among other observations on the subject of testamentary capacity: The sole question in this case which you have to determine is, in the language of the record, whether Mr. John Knight, when he made his will on the 27th of January, 1869, was of sound mind, memory, and understanding. In one sense, the first phrase, *sound mind*, covers the whole subject; but emphasis is laid upon two particular functions of the mind, which must be sound in order to create a capacity for the making a will; there must be a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their rela-

tionship to himself and their claim upon him. But for convenience the phrase "sound mind" may be adopted, and it is the one I shall make use of throughout my observations. Now you will naturally expect from me a definition, or at any rate an explanation of the legal meaning of the words "sound mind," and I will endeavour to give you such assistance as I am able, either from my own reflections on the subject, or by the aid of what has been said by other judges, whose duty it has been to consider this important question before me. I must commence, however, by telling you what these words do not mean. They do not mean a perfectly balanced mind. If so, which of us would be competent to make a will? Such a mind would be free from all influence of prejudice, passion, and pride. But the law does not say that a man is incapacitated from making a will if he proposes to make a disposition of his property moved by capricious, frivolous, mean or even bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this: to take care that that, and that only, which is the true expression of a man's real mind, shall have effect given to it as his will. In fact, this question of justice and fairness in the making of wills in a vast majority of cases depends upon such nice and fine distinctions that we cannot form, or even fancy that we can form, a just estimate of them. Accordingly, by the law of England, every one is left free to choose the person upon whom he will bestow his property after death, entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued. In this respect the law of England differs from that of other countries.[1] It is thought better to risk the chance of an abuse of the power arising from such liberty than to deprive men of the right to make such a selection as their knowledge of the characters, of the past history and future prospects of their children or other relatives may demand, and we must remember that we are here to administer the law of England, and we must not attempt to correct its application in a particular case by know-

[1] The law in our States is in this respect like that of England, save for our statutes restricting gifts to charity, etc. See Index, "Restrictions."

ingly deviating from it. I have said that we have to take care that effect is given to the expression of the true mind of the testator, and that, of course, involves a consideration of what is the amount and quantity of intellect which is requisite to constitute testamentary capacity. I desire particularly now, and throughout the consideration which you will have to give this case, to impress upon your minds that, in my opinion, this is eminently a practical question, one in which the good sense of men of the world is called into action, and that it does not depend solely on scientific or legal definition. It is a question of degree to be solved in each particular case by those gentlemen who fulfill the office which you have now imposed on you, and on this point for accuracy I should wish to quote the words themselves of Lord Cranworth in Boyse v. Rossborough:[1] "On the first head the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or a drivelling idiot in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine." In considering the question, therefore, of degree, large allowance must be made for the difference of individual character. Eccentricities, as they are commonly called, of manner, of habits of life, of amusements, of dress, and so on, must be disregarded. If a man has not contracted the ties of domestic life, or if, unhappily, they have been severed, a wide deviation from the ordinary type may be expected, and if a man's tastes induce him to withdraw himself from intercourse with friends and neighbours, a still wider divergence from the ordinary type may be expected. We must not easily assume that because a man indulges his humours in unaccustomed ways that he is therefore of unsound mind. We must apply some other test than whether or not the man is very different from other men. Now the test which is usually applied, and which in almost every case is found sufficient, is this: Was the man labouring under delusion? If he laboured under delusion, then to some extent

[1] 6 H. L. C. at p. 45.

his mind must be unsound. But though we have thus narrowed the ground, we have not got free altogether from difficulty, because the question still arises, What is a delusion? On this subject an eminent judge who formerly presided in the Court, the jurisdiction of which is now exercised here, Sir J. Nicholl, in the famous case of Dew v. Clark and Clark,[1] says: "One of the counsel (Dr. Lushington) accurately expressed it; it is only the belief of facts which no rational person would have believed that is insane delusion." Gentlemen, in one sense, that is arguing in a circle, for, in fact, it is only saying that a man is not rational who believes what no rational man would believe; but, for practical purposes, it is a sufficient definition of a delusion, for this reason—that you must remember that the tribunal that is to determine the question (whether judge or jury), must, of necessity, take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure, in this sense, that you should say, I do not believe such and such a thing, and therefore the man who does believe it is insane. Nay, more, you must not say, I should not have believed such and such a thing, therefore the man who did believe it is insane. But you must of necessity put to yourself this question and answer it: Can I understand how any man in possession of his senses could have believed such and such a thing? And if the answer you give is, I cannot understand it, then it is of the necessity of the case that you should say the man is not sane. Sir J. Nicholl, in another passage,[2] gives what appears to me to be a more logical and precise definition of what a delusion is. [Here follows the statement given *ante*, p. 16.] I believe you will find that that test applied will solve most, if not all, the difficulties which arise in investigations of this kind. . . . .

It is unfortunately not a thing unknown that parents—and in justice to women I am bound to say it is more frequently the case with fathers than mothers,—that they take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which one feels that it ceases to be a question of harsh, unreasonable judgment of character, and

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[1] Reported by Haggard, London, 1826, at p. 7; 3 Add. Eccl. 79.
[2] 3 Add., p. 90.

that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them injury or deprive them of advantages which most men desire above all things to confer upon their children. I say there is a point at which such repulsion and aversion are themselves evidence of unsoundness of mind. Fortunately the case is rare. It is almost unexampled that a delusion consisting solely of aversion to children is manifested without other signs which may be relied on to assist one in forming an opinion on that point. Perhaps the case which most nearly approaches such an one was Dew v. Clark and Clark.[1] In that case there were indeed some minor matters which were adverted to by the judge in giving his judgment, but he passed over them naturally lightly. For instance, there was the fact that the testator, who had practiced medical electricity, attached extraordinary importance to that means of cure in medical practice. He conceived that it might be applied to every purpose, amongst the rest even to the assisting of women in childbirth. But these were passed over, although not cast aside altogether by the learned judge, as not entering into the basis of his judgment. What he did rely upon was a long, persistent dislike of his only child, an only daughter, who, upon the testimony of everybody else who knew her, was worthy of all love and admiration, for whom indeed the father entertained, so far as his nature would allow, the warmest affection; but it broke out in the most extraordinary form: he desired that his child's mind should be entirely subjected to his own, that she should make her nature known to him, and confess her faults, which of course a human being can only do to its Maker; and because the child did not fulfill his desires and hopes in that respect, he treated her as a reprobate and an outcast. In her youth he treated her with great cruelty. He beat her, he used unaccustomed forms of punishment, and he continued throughout his life to treat her as if she were the worst, instead of apparently one of the best of women. In the end, he left her indeed a sum of money sufficient to save her from actual want, if she had needed it; but in fact, she did not need it. She

[1] Reported by Haggard, London, 1826; 3 Add. Eccl. 79.

was well married to a person perfectly able to support her, and it might have been argued that he was content to leave her to a fortune which she had secured by a happy marriage. He was not content to leave her so. He bequeathed to her a sum of money which would have been sufficient, in case her husband had fallen into poverty, to save her from actual want, and the rest of his property he left, not to strangers or charities, but to two of his nephews. He was a man who throughout life had presented to those who met him in the ordinary way of business or the ordinary intercourse of life the appearance of a rational man. He had worked his way up from a low beginning. He had educated himself as a medical man, going to the hospitals and learning all that could be learned there, and he amassed a large fortune, considering what he commenced with, some £25,000 or £30,000, by the practice of his profession. Yet, upon the ground I have mentioned, that the dislike he had conceived for his child had reached such a point that it could only be attributed to mental unsoundness, the will so made in favour of the nephews was set aside, and the law was left to distribute his property without reference to his will. I have said that one usually has other facts before one beside the bare circumstance of a father conceiving a dislike for a child, by which to estimate whether such dislike were rational or irrational; so in this case it has been contended there are criteria from which to judge of Mr. Knight's treatment of his children in his lifetime, and after his death by his will. You are entitled, indeed are bound, to consider this case not in reference to any particular act, not to confine your attention to one particular act such as the making of a will, but you must consider Mr. Knight's life as a whole in order to determine whether in January, 1869, when he made the will, he was of sound mind. Gentlemen, I think I can give you some assistance in determining the question before you by referring to what has been said on the subject in another department of the law. Some years ago the question of what amount of mental capacity was required to make a man responsible for crime was considered in McNaughten's Case.[1] No doubt the question is treated somewhat differently in a criminal suit to what it is here (the difference I will explain presently); but there is, as you will easily see, an analogy between the cases which

[1] 10 Cl. & F. 200.

will be of use to us in considering the points before us. Lord Chief-Justice Tindal, in expressing the opinion of all the judges, said: "In all cases every man is to be presumed to be sane until the contrary is proved, and it must be clearly proved, that at the time of committing or executing the act the party was labouring under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." That, in my opinion, affords as nearly as possible a general formula which is applicable in all cases in which the question arises, not exactly, perhaps, in the terms I have read, but to the extent I will explain to you. It is essential, to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall be able to distinguish in the act he is doing right from wrong. Now, a very small degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act, and whether he is doing right or wrong, when he kills another man; accordingly he is responsible for the crime committed if he possesses that amount of intelligence. And so in reference to all other concerns of life,—was the man at the time the act was done of sufficient capacity to understand the nature of the act? Take the question of marriage. It is always left in precisely the same terms as I have to suggest in this case. If the validity of a marriage be disputed on the ground that one or other of the parties was of unsound mind, the question will be, was he or she capable of understanding the nature of the contract which he or she had entered into? The same will occur in regard to contracts of selling and buying. Again, take the case suggested by counsel, of a man, who being confined in a lunatic asylum, is called upon to give evidence. First, the judge will have to consider, was he capable of understanding the nature and character of the act that he was called upon to do, when he was sworn to speak the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If so, then he was of sufficient capacity to give evidence as a witness. But, gentlemen, whatever degree of mental soundness is required for any one of these things,—responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness,—I must tell you, without fear of contradiction, that the highest degree of all, if degrees there

be,[1] is required in order to constitute capacity to make a testamentary disposition. And you will easily see why. Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention. Now I would call your attention to a case which has been frequently adverted to during the course of this trial, the case of Banks v. Goodfellow,[2] which was decided in the Court of Queen's Bench, when I had the honour of being a member of it. I was a party to the judgment, but the language of it was that of the present Lord Chief-Justice. As a party to it, I am bound by it in the sense in which I understand its words. There can be little room for misconception as to its meaning, but I will explain to you the scope and bearing of it. It was a case in which a man who had been subject before and after making his will to delusions, was not shewn to be under the influence of those delusions at the time, or, on the other hand, to be so free from them, that if he had been asked questions about them, he would not have manifested that they existed in his mind. But he made a will, by which he left his property to his niece, who had lived with him for many years, and to whom he had always expressed an intention to leave his property, and to whom, in the ordinary sense of the word, it was his duty to leave the property, and of whom it was right he should take care on his death. It was left to the jury to say whether he made that will uninfluenced by the delusions he was shewn to have had before and after; and the jury found that the will which I have described to you was made free from the influence of the delusions under which he suffered; and it was held that, under those circumstances, the jury finding the fact in that way, such finding could not be set aside. I will not trouble you by reading the whole judgment, which, however, would well repay the trouble of reading it, by laymen as well as by professional men, but I will pick out passages to shew you how

[1] Concerning this expression, Sir J. Hannen has since said (see note, L. R. 3 P. & D.), "It has been erroneously supposed that I said [in Boughton v. Knight], that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said, and I never meant to say so. What I have said, and I repeat it, is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness is required to make a will." In fact, it would appear after all attempts to lay down a rule, that each case must go on its own general merits.

[2] L. R. 5 Q. B. 549.

carefully guarded against misapprehension the decision is. I shall have occasion by-and-by to call your attention to instances in which I think it has been sought to apply it incorrectly in the arguments which have been addressed to you. In one passage the Lord Chief-Justice says: "No doubt when the fact that a testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should, in the first instance, be made against it. Where insane delusion has once been shewn to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong, where the will is, to use the term of the civilians, an inofficious one; that is to say, one in which natural affection and the claims of near relationship have been disregarded." In an earlier passage the Lord Chief-Justice lays down with, I think I may say, singular accuracy, what is essential to the constitution of testamentary capacity: "It is essential to the exercise of such a power (of making a will) that a testator shall understand the nature of the act, and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease, if insane suspicion or aversion take the place of natural affection, if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence, in such a case it is obvious that the condition of testamentary power fails, and that a will made under such circumstances ought not to stand." Gentlemen, I have no fear, when rightly understood, of

that case being misapplied. . . . . Now, gentlemen, these being the epochs of his life, let us direct our attention to the manifestations of character and condition of mind in him. I have already said, in my opening observations, that a very large allowance must be made for eccentricities. I do not say that they never in themselves can amount to evidence upon which a jury would be justified in coming to the conclusion that a man is of unsound mind, when coupled with what I will call, for convenience sake, an unnatural will, but, certainly, eccentricities must not be allowed to weigh heavily in the scale against the argument that a man is of sound mind. Really the forms and usages of society surround us like an atmosphere, and compress us all into a somewhat monotonous uniformity of mould, and if a man is relieved from this pressure, his individuality will expand into strange and sometimes fantastic shapes, but it must not be assumed he is on that account insane. Many of the acts of the deceased of this kind, which have been enumerated by counsel, cannot, I think, in themselves establish, and are very far from establishing, unsoundness of mind. They may suggest the idea, they may help to confirm the idea derived from other sources, that there was unsoundness in his mind; they may, so to speak, fill up the crevices of the argument, but they do not themselves constitute sound material on which a conclusion can be built as to the deceased's capacity. (His Lordship fully reviewed all the evidence which had been produced at the trial, and concluded:)

It is for you to say whether the accumulation of this evidence (for the defendants) has not this effect on your minds that it leads you to the conclusion that, whatever fluctuation there may have been in the condition of Mr. Knight's mind, for some years before he made this will he had been subject to delusions, especially in reference to the character, the intention, and the motives of his son's acts; and if you so find, then I must impress upon you that it becomes the duty of the plaintiffs to satisfy you that at the time the testator made the will he was free from those delusions, or free from their influence. The burthen of proof, as it is called, is upon those who assert that the testator was of a sound and disposing mind.[1] In considering the question you cannot put aside the contents of, and surrounding circumstances connected with,

[1] See Index, "Burden of Proof."

the will. Again, on considering whether or not the testator was free from delusions as to the characters of his several sons, when he passed them over in the disposition of his real estate, leaving them only limited sums of money out of his personalty, you must not disregard the fact that he selected in their place one who had no natural claims upon him, of whom he knew little, and to whom he was under no such obligations as are usually recognized as the foundation of such gifts. You must take that into your consideration in determining whether at the time the deceased made his will those prevailing delusions to which I have referred had passed away, or were utterly inoperative. Gentlemen, I have detained you at some length. I felt the importance of the case was such as to justify it, and I now leave you to discharge that responsible duty of which I reminded you at the outset of the observations I have addressed to you.

The jury found, that on the 27th of January, 1869, the date of the will propounded by the plaintiffs, the deceased, John Knight, was not of sound mind, memory, and understanding. (Here follows a further opinion on the matter of costs.)

Will pronounced against.

INSANE HATRED FOR A SON.

Merrill v. Roiston.

SURROGATE'S COURT, NEW YORK COUNTY, NEW YORK, 1881.

(5 Redf. 220.)

Application for the probate of instruments purporting to be the last will, and codicil thereto, of Caroline A. Merrill, and bearing date respectively on May 2, 1871, and December 9, 1875.

George Merrill, a nephew and adopted son, and others, contested on the ground of mental incapacity and undue influence. The court found that, in view of all the testimony, "there was no doubt as to her entire soundness of mind, except as to her so-called delusion respecting George Merrill and his wife"; and also that there was no reasonable ground for finding that testatrix had been unduly influenced.

George Merrill had been informally adopted by testatrix and her husband, about 1838 (he being a nephew of decedent). The

father died in 1867, leaving a will executed in 1856, giving George $30,000, and all in case of decedent dying before her husband. Decedent also made a will in November, 1856, giving all her property to her husband, but in case of his death before her, to George. She wrote him from time to time, in most affectionate terms, addressing him as "My dear George," and signing herself, "Your affectionate mother."

Subsequently, and without any cause shown, decedent underwent a complete revulsion of feeling toward George, said she had closely watched him, and was completely convinced that he was "*entirely without principle, truth, natural affection, faith in religion—in fact, every element that made a human being above a brute.*" She also made scurrilous, obscene, and utterly false charges against George's wife. She also wrote him as follows: "I heartily say, may you become as deaf as your sister is; may you become so blind that you cannot distinguish night from day; may you have every trial, every disease, every affliction that was ever sent upon man; may I live to see you hung—hung up by your lying tongue, is my unceasing wish. In conclusion, I give you the curses of her you have called mother for twenty-seven years," etc.

She had a portrait of George, which she mutilated by cutting out the mouth and thumb, and she stated as a reason for the act *that he had a lying tongue and a false pen, and should never be allowed to speak or write again.* Many other things are set forth in the reported case, of a similar character, none of them having any basis of fact whatever.

Calvin, S. (after a full review of the testimony, and after examining and disposing of other points):

Taken in conjunction with the foregoing facts and circumstances, her vulgar and false charge, without the remotest foundation, of illicit intercourse between George and his intended wife; the general imputation of unchastity, equally baseless; her diabolical and fiendish imprecations upon George, just referred to; her incoherent and impious curses; her senseless mutilation of her will and his portrait, and the reasons given for it, all combine to show that, if decedent was of sound mind, an intelligent, affectionate, kind, modest, truthful, Christian woman had been transformed into a bold, defiant, passionate, unfeeling, cruel, false, vulgar, and

obscene fiend incarnate, which cannot be pleaded even as a thoughtless ebullition of intemperate, ungovernable anger and jealousy, for the utterances were oft repeated and rewritten with deliberation at distances from the object of her malediction, with nothing apparently but a distorted brain to account for her transformation so complete and the delusions so marked, which would be a signal mercy to her memory and the fame of her sex to ascribe it to a *morbid or insane delusion.*

It is the essence of an *insane delusion* that, as it has no basis in reason, so it cannot by reason be dispersed, and is thus capable of being cherished side by side with other ideas with which it is rationally inconsistent. (Smith v. Tebbitt, L. R. 1 P. & D. 398.)

An insane delusion is not only one which is founded in error, but one in favor of the truth of which there is no evidence, but the clearest evidence often to the contrary. It must be a delusion of such a character that no evidence or argument will have the slightest effect to remove. (1 Redf. Law of Wills, 86; Florey v. Florey, 24 Ala. 241.)

(The Surrogate here quotes with approval from Stanton v. Weatherwax, 16 Barb. 259, the definition[1] given by Sir John Nicoll, there quoted and approved; cites 1 Bouv. Dict., "Delusion," and cases cited; and discusses Clapp v. Fullerton, 34 N. Y. 190; 1 Redf. on Wills, 86, note 22; and Seamen's Friend Society v. Hopper, 33 N. Y. 619. He then proceeds as follows:)

The whole character, deportment, and conduct of George Merrill has been conclusively proved to have been a complete refutation of decedent's accusations, which accusations, however, appear to have been confidently believed by her, for it would be an unjust and unwarranted accusation that she knew them to be untrue, and yet persisted in charging and acting upon their truth.

Her belief that the Green & Co. matter [a subject referred to in the testimony,] had killed her husband, and that he said so repeatedly, is against reason and contrad.cted by all the probabilities of the case, and the whole character of her husband afforded the most persuasive evidence against the assertion. The education, manners, culture, habits, talents, morals, generous, honorable, and manly instincts of George Merrill contra-

[1] In Dew v. Clark, 3 Add. 90, see *ante*, Boughton v. Knight.

dicted all her slanderous and libellous charges against him, and the verbal and written opinions of her husband, and of herself, furnish the most indubitable refutation of her allegations that neither his adopted father or she ever felt any interest, confidence, or affection for him; and in her case, her unvarying statements in her correspondence of about eight years after George had graduated, afford positive proof that she often stated and wrote most obvious falsehoods respecting him, and of her opinion of and sentiments toward him, so that she believed the untruths, *not only without evidence, but against the cogent arguments which the facts afforded.*

Another feature which it seems to me should have some weight in this inquiry, is that the prejudices, jealousy, vindictiveness, and vulgarity of the decedent did not exhibit themselves as connected with any other matter than her relations to George, his wife, and the Green & Co. matter, and it seems perfectly obvious that the decedent was possessed of a morbid mind upon those subjects, from which there is no evidence that she ever recovered; but on the contrary, whenever her mind rested upon these subjects, a morbid delusion exhibited itself; and I am of the opinion that she entertained them until the execution of her will and codicil propounded, and they constituted the motive and occasion of her change of the terms of her will of 1856, and the disinherison of George.

This brings me to the inquiry whether the insane delusions in respect to George were such as to avoid the will and codicil. Redfield, in his first volume, at page 79, states the rule thus: "Whenever it appears that the will is the direct offspring of partial insanity, or monomania, under which the testator was laboring, it should be regarded as invalid, though his general capacity be unimpeached." (Boyd v. Eby, 8 Watts 71; Tawney v. Long, 76 Penn. 106; Dew v. Clark, 1 Add. 279, 3 Id. 79.)

Willard on Executors, at page 8, says, of the latter case, it must be considered as establishing the doctrine that partial insanity will invalidate a will which is fairly inferred to be the direct offspring of that insanity.

In Waters v. Cullen (2 Bradf. 354), the will was set aside on the ground of insanity, the testatrix having died of *delirium tremens*, to which she had been subject more or less, for some time before her death; she gave her property to the children of her

first husband, and left those by the last penniless, stating as the reason, that the property came from her first husband; it also appeared that she believed that she had been poisoned by the father of the children whom she left unprovided for, and it was held that she labored under an insane delusion in both respects. In Stanton v. Wetherwax, above cited, the same doctrine is maintained. See also Seamen's Friend Society v. Hopper, above cited.

In Lathrop v. American Board of Foreign Missions (67 Barb. 590), the decree of the Surrogate, refusing probate of the instrument propounded on the ground that it was executed under the delusion that his relatives and acquaintances had entered into a conspiracy to rob him of his property, he being a confirmed monomaniac upon the subject of Freemasons, and charging that his relatives were Freemasons, was affirmed.

In Lathrop v. Borden (5 Hun 560), the same doctrine is maintained; also in Clapp v. Fullerton, above cited (see also Brick v. Brick, 66 N. Y. 144; Coit v. Patchen, 77 Id. 533; Denson v. Beazley, 34 Texas 191).

In Gardner v. Lamback (47 Ga. 133), the charge to the jury, that if the testator was partially insane, and the will was in any way the effect or result of that insanity, it was void, was sustained.

In Potts v. House (6 Ga. 324), it was held that if the testator was partially deranged, either as to the legatees or subject matter of his will, he was mentally unsound in respect to the particular will, however unimpeachable his capacity in other respects. (See Lucas v. Parsons, 24 Id. 640; Brooke v. Townshend, 7 Gill. 10; Robinson v. Adams, 62 Maine 369; Benoist v. Murrin, 58 Mo. 307; Stackhouse v. Horton, 15 N. J. Eq. 202.)

If the argument of the learned counsel for the residuary legatee in this proceeding was rightly apprehended upon this branch of the case, it was that George Merrill had no claims upon the testatrix's bounty, and therefore any insane delusion as to him would not invalidate the instrument propounded.

Upon the most careful consideration which I have been able to give the elementary treatises and decisions upon the subject, I am not able to find any such distinction enforced or recognized. The fact that George was next of kin of decedent, who would have taken a share of her property in case of intestacy, and had been informally adopted by decedent's husband and recognized by him

and the decedent as a son, with the declared intention that he should succeed to their property, and the execution of decedent's will of 1856, by which George became the sole beneficiary, seem to me to establish a claim upon the bounty of decedent which cannot be denied, for as next of kin, in the absence of a will, he had a claim upon her bounty, and that claim certainly was not weakened by adoption and treatment as a son, and it is too clear for argument that if the instruments propounded are void for want of mental capacity on the part of the decedent to execute them, then at her death, notwithstanding the execution of them, George became the vested owner of all her property.

Suppose that the decedent, after the execution of her will of 1856, had been informed by one of her other relatives that George had died, and in the honest belief of that fact, she made a new will, giving all her property to that relative who had thus deceived her, would there be any doubt that George, by virtue of the former will, had such claims upon the decedent as to entitle him to contest the later will, and to allege that it was made under fraudulent representations, and therefore void, and that fact being established, is it not manifest that it would revive the former will, and thus vest in the contestant all his rights?

Indeed, I am inclined to the opinion that if George had been an entire stranger to the decedent, and under an insane delusion she had changed her will, which had given him her property, to his disinherison, that insane delusion would avoid the latter instrument and revive the former.

I am not able to understand why a will made by an insane person should be invalidated, when it deprives a near relative of an expected bounty, and *validated*, when it deprives a remote relative of a like bounty, for it is the *insanity* which avoids the act, and if the will clearly appears to have been executed under an *insane delusion*, it would be equally void as if executed by one who was a confirmed lunatic or utterly demented, and George, if a stranger, could contest the will thus made, because of his rights under the former will.

See Walsh v. Ryan (1 Brad. 433), where it was held that it was competent for a legatee under a will to oppose the proof of a codicil, which purported to revoke his legacy given by the will.

In Gombault v. Public Administrator (4 Brad. 226), it was held

that the public administrator might intervene to contest the probate of a will as to the personal estate, and the attorney-general as to the realty.

I can conceive no logic which would validate a will executed as the offspring of an *insane delusion*, and the only significance that the relationship of the parties contesting, as the subject of the insane delusion, can have, is in determining whether the will was the offspring of the particular delusion alleged.

I am fully aware of the fact that the setting aside or rejection of a will is the exercise of a very radical judicial prerogative, and that it should not be exercised except upon very satisfactory proofs. But if I am right in holding that decedent made the will and codicil offered for probate, under a delusion as to the character and conduct of George Merrill, and that delusion was such as the law adjudges *insane, the will and codicil must be refused probate.* This latter conclusion renders it unnecessary to consider the point raised as to the provisions in behalf of Cardinal McCloskey, being in fact in trust for the benefit of "religious or missionary societies or corporations."

The instruments propounded should be refused probate because they were executed by the decedent when laboring under an *insane delusion*, the same being the direct offspring of such delusion.

Let a decree be entered accordingly.

[A person entertaining even violent dislike to another may be actuated in so doing from a fancied and unreal cause. He may in this respect be said to be laboring under a delusion. Yet it would not necessarily be such a delusion as would justify his being pronounced insane. Mere antipathy to those most nearly related to testator, without just and sufficient cause, will not in itself invalidate a will. The delusion which will invalidate a will must point to actual unsoundness of mind. In other words, it must be an insane delusion.[1]]

LUCID INTERVALS.

Nichols and Freeman v. Binns.

ENGLISH COURT OF PROBATE, 1858.

(1 Sw. & Tr. 239.)

This was a cause of proving in solemn form the last will and testament of Mr. William Wiggett Parkinson, who died on the

[1] Brown v. Ward, 53 Md. 376 (392); Clapp v. Fullerton, 34 N. Y. 190.

27th of August, 1857, in the Heightam Hall Lunatic Asylum, Norwich, promoted by Nichols and Freeman, the executors named therein. The will in question was dated the 15th day of November, 1851, and was signed by the deceased during his confinement in the above-named asylum, and attested by three witnesses. Probate of the will was opposed by the defendants, H. B. Binns and Mary Ann, his wife, who was the niece and sole next of kin of the deceased, on the ground that at the time of its execution he was of unsound mind.

Sir C. CRESSWELL (to the jury): The question for your decision is, whether Mr. Parkinson, the deceased in this case, who is proved to have been insane at times and for long periods of time during many years, was in the enjoyment of a lucid interval when he executed this will.

Where a person is never shown to have been insane, the law presumes that he is sane; but if insanity is once proved to have been during a period of his life his normal state, it is necessary, in order to establish the validity of any act which he may have done during that period, to show that he was sane at the time of his doing that act.

I have referred to the case of Cartwright v. Cartwright,[1] which is a decision by Sir William Wynne in the Prerogative Court, and is one which has been frequently quoted. The testator in that case was a lady afflicted with permanent insanity, and living under restraint, but who was proved to have had intermissions of her complaint; she drew up, without assistance, and in proper form, a will in her own handwriting; she was apparently, almost at the moment of preparing it, in considerable excitement; for she was seen at the time to write upon several pieces of paper and tear them up in a wild and excited manner and throw them into the fire; but the will in question appeared certainly to have been a right and natural will for her to have made, and was held to be a good will. Sir William Wynne, in his judgment in that case, is reported to have said: "If it can be proved that this is a rational act rationally done, the whole case is proved. What can you do more to establish the act?" But this expression of the learned Judge cannot be applied strictly to all cases. The mere fact that

[1] 1 Phill. 90.

the act is rational, and done in a rational manner, is not, I think, in itself conclusive evidence of sanity; although in every case it will be very strong evidence of sanity, tending greatly to satisfy the mind of a rational person that the party so doing that act was at the time in full possession of his senses. But after a paroxysm of insanity has passed away, insanity may still be lurking in the mind of the patient, although there is nothing apparent on the surface to show it.

It was argued by counsel in opposition to this will, that although when the deceased made it, *apparently* he was restored to sanity, yet there might have still been insanity lurking within, which was not observable; and he told you of two or three remarkable instances, the traditions of the bar in Westminster Hall, in [1] one of which a great and experienced advocate cross-examined a witness a long time before he could discover that he was insane. He did not do so until he touched upon the subject upon which he laboured under a delusion. But in all those cases you will, I believe, find that the person was labouring under an insane delusion; and where this is the case, unless you discover what the delusion is, and bring the subject of his delusion under his attention, you may not discover that he is insane. This will not apply to the present case, for there is no proof that the deceased was ever subject to any delusion. Indeed, it appears according to the evidence of one gentleman, Mr. Nichols, who gave his evidence, I thought, very sensibly, that the deceased's was a case of recurrent mania, and that his existence was passed under three different sets of circumstances—raving madness; depression, amounting to an insane state of mind; sanity. And Mr. Watson said, that as his bodily health became stronger, there was again an increased and inflammatory action of the brain, and again he became violent; then came another fit of depression, and then sanity, and so on in a regular course. But in no part of their evidence do they ever say there was anything like a delusion by which at any period they could test whether he was sane or not. It was therefore only by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals, that any one could judge whether he was sane or not.

[1] Mr. Greenwood's case.

It appears that the deceased (and there is no doubt about this) had two nieces, one (Mrs. Freeman) who had always pleased, and the other (Mrs. Binns) who had disobliged him. Mrs. Freeman had three children, and Mrs. Binns had one. He had made a will in 1839, the arrangements of which were entirely defeated by the death of Mrs. Freeman and her brother; so that if no new will were made, nearly the whole of his property would have gone to the niece who had disobliged him, to the exclusion of those with whom he had always been satisfied, and upon whom he had bestowed a great share of his affection. It is also admitted that when he was removed from the first lunatic asylum in which he was placed, I mean Mr. Dalrymple's asylum, the house he went to was Mr. Freeman's. He went there and remained there for nearly four years (in the course of which he had occasional fits of insanity), and during that time there does not appear to have been any trace of friendly or kindly intercourse between him and Mr. and Mrs. Binns.

There is no doubt that the execution of this will was a very responsible transaction; and that a will prepared and executed in a lunatic asylum by a man not generally in possession of his faculties, ought to be regarded with great care and jealousy; but this should not be carried too far; for a person may be in a lunatic asylum because he is afflicted by a malady which makes it necessary that he should be placed under restraint, but who at times may be perfectly sane; and if he was prevented from disposing of his property according to his wishes it would be a great hardship upon him. I can fancy a case where such a person being conscious that he was labouring under a restraint, and feeling that his property, if he did not make a disposition of it, would not go as he thought right and just, would be much affected if he thought that he could not otherwise dispose of it. We have some trace of this kind of feeling in the present case. Mr. Watson says: "The deceased frequently mentioned to him his family; and said he wished to make, if possible, a fresh and more even adjustment of his property, and that he mentioned the death of Mr. Joseph Parkinson, and also of his niece, Mrs. Freeman, and said that in consequence of their death the whole would go to Mrs. Binns, which was not his wish or intention." Then, again, there is a remarkable circumstance spoken to by Mr. Nichols, that this annoyed him

very much, and distressed and disturbed him, and that he was very anxious about it; that he knew his position,—that he was in a lunatic asylum,—and felt that there was a difficulty about making his will, and had asked him if it could not be done.

It is said that there is some little difference between the instructions and the will. But the will is substantially in accordance with the instructions; it was read over and explained to the testator, and he was perfectly satisfied with it.

In addition to this, you have the evidence of Mr. Nichols, Mr. Watson, Dr. Rankin, and Mr. Mills, whose characters are high in the profession to which they belong. Two of these gentlemen, Mr. Nichols and Mr. Watson, tell you that in the month of August, 1851, they saw the testator in the lunatic asylum, and that they had no doubt of his sanity at that time; and the other two gentlemen were called in for the purpose of ascertaining the state of his mind in November, and although they do not recollect the questions they put to him,—Dr. Rankin says that he was with him for about three-quarters of an hour, and that he endeavored to test his understanding,—and they both say that they were perfectly satisfied of his competency at that time.

At the conclusion of the learned Judge's charge, the jury having retired for a few minutes, found by their verdict that the will was made by the deceased in a lucid interval.

INSANITY.—LUCID INTERVAL.

Matter of Will of Sarah J. Macpherson.

SURROGATE'S COURT, NEW YORK COUNTY, NEW YORK, 1889.

(20 N. Y. St. Rep. 868.)

Ransom, S.—A perusal of the testimony taken in this case must lead any mind to the conclusion that the testatrix, for a considerable period before her death, was an excitable, sickly woman, who, on slight provocation and often without apparent cause, flew into fits of passion and displayed many symptoms of a diseased mind. Conversation on topics connected with certain of her relatives invariably excited her to some outburst. No person in the enjoyment of her senses would have composed the letter which appears to have been left at the house of Judge Angell by the deceased. Nevertheless, the unanimous testimony of the witnesses (with pos-

sibly the single exception of Mrs. Angell) is to the effect that, while these manifestations of an unhealthy mind were chronic from the date of her first illness, she was sometimes, for continued periods of time, in the possession of her faculties.

In the light of these facts, the law as laid down in the case of Gombault v. Public Administrator (4 Brad. 226), might be taken as the text upon which to write a decision of this cause, viz.: "A will made in a lucid interval may be valid; but the facts establishing intelligent action must be shown. The nature and character of the instrument as to its dispositions have great influence, and it is important to ascertain whether they harmonize with the decedent's affections and intentions otherwise expressed."

In the case at bar the subscribing witnesses prove the due execution of the will, and that at the time the testatrix had mental capacity to make a will. One of the subscribing witnesses was a law clerk, and presumably familiar with the legal requisites. The will was drawn by Mr. Rudd, after an interview with testatrix, who called at his office for the purpose of giving instructions therefor. Thereafter he received a note from testatrix containing substantially similar directions, and the will was drawn accordingly, and sent to her by a messenger who superintended its execution at the house of the decedent. At this interview with Mr. Rudd he testifies that she conversed rationally upon the subjects introduced. That the will is in accord with her expressed intentions appears by the testimony of her brother, as well as by the evidence of Mr. Rudd.

In the case of Chambers v. Queen's Proctor (cited in Gombault v. Public Administrator, *supra*) the decedent died by his own hand the day after he executed the will. There had been indications of insanity immediately before and after its execution. The court said: "If done during a lucid interval the act will be valid, notwithstanding previous and subsequent insanity," and the will was upheld mainly on the ground of the reasonable dispositions contained in the instrument, the absence of proof of delusion at the time of the factum and the rational manner in which the act was performed.

Every incident specified in that case is supplied here for the purpose of supporting the will; and I am of opinion that the will should be admitted to probate.

LUCID INTERVAL.—BURDEN OF PROOF.

White v. Driver.

PREROGATIVE COURT OF CANTERBURY, 1809.

(1 Phillim. 84.)

Elizabeth Manning died on the 26th of January, 1805, at the house of Mr. Driver, at Chadwell, in Essex; the only relations who survived her were two sisters and a nephew and niece, the children of a deceased brother; her will bore date the day immediately preceding her death; her property was bequeathed in thirds—one-third to the nephew, another to the niece, and the remaining third to their mother, the widow of her brother, who since his death had intermarried with Mr. Driver. The will purported to be signed and executed in the presence of three witnesses.

The two sisters impeached the validity of this instrument on the ground of the insanity of the testatrix.

Many witnesses were examined who deposed to the childish and extravagant conduct of the deceased at several periods of her life, while others testified to her apparently sane and rational condition for a few days preceding her death.

JUDGMENT.

Sir JOHN NICHOLL (after recapitulating the evidence):

The evidence in this case sufficiently establishes that the deceased had been at times subject to insanity for several years preceding her death, and even down to the 21st of January, 1805, only four days prior to the execution of the will in question, but it does not appear that the disorder was uniform, or always attacked her with an equal degree of violence. She was at large the greater part of her life, and had the management and dominion of herself and her actions. She seems to have had violent accessions of the disorder in the years 1793 and 1794, in 1801, and again in 1804. The evidence, however, does not preclude the proof of lucid intervals, although it raises a strong presumption against sanity; for I agree with the counsel for the next of kin that, wherever previous insanity is proved, the burthen of proof is shifted, and it lies on those who set up the will to adduce satisfactory proof of sanity at the time the act was done.

It is scarcely possible, indeed, to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognizes acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact.

In this case the deceased had been subject not only to eccentricities, but to delusion and derangement at different periods for several years, but it was not continuous; she was not under confinement; she managed her own affairs; she earned her own livelihood; when she came out of the workhouse on the 21st of January she acted immediately, and continued to act from that moment till her death, as a sane and rational person. There is no indication of any fraud or circumvention in procuring this will, or even in suggesting it to her; a desire to make a will is not with her an insane topic; it is recommended very properly to her by the clergyman who was sent for to pray by her, and the intention of making it was first communicated by the deceased to an old acquaintance of hers of the name of Turner; the utmost possible precaution was used by Turner in carrying her wishes into effect, by securing the attendance of an attorney, two medical gentlemen, and the clergyman.

The deceased herself declares and directs the disposition of her property: the disposition itself is neither insane nor unnatural; two-thirds are left to the children of a deceased brother, and the remaining third to his widow and her second husband, and these two persons are appointed her executors; her sisters, it is true, are excluded; but they were both married, and possibly had no great claims on her.

The Court has the concurrent opinion of these several persons, viz.: Mr. Turner, the deceased's friend; Mr. Williams, the clergyman; the solicitor, the two apothecaries, and the nurse; and that, too, with all their suspicions awakened, and their vigilant observation called forth that the deceased was perfectly sane and rational throughout the whole period of the transaction; some of them also prove that she was equally sane and rational a day or two before, and continued so till her death on the subsequent day.

Notwithstanding, therefore, all the jealousy which the Court should feel as to the act of a person once proved to have been insane, still under this evidence it is impossible not to concur with

these witnesses in opinion that the deceased was of sound mind; and, consequently, I am bound to pronounce for the validity of her will.

RATIONAL ACT RATIONALLY DONE.

Dame Byzantia Clerke, heretofore Cartwright, and Cartwright v. Cartwright and others.

PREROGATIVE COURT OF CANTERBURY, 1793.

(1 Phillim. 90.)

JUDGMENT.

Sir WILLIAM WYNNE.

The question in this cause arises upon the will of Mrs. Armyne Cartwright, deceased, which has been opposed and propounded on behalf of the contending parties.

The will is on all sides admitted to be in the handwriting of the deceased; and it is in these words:

"Wigmore Street, August 14, 1775. I leave all my fortune to my nieces, the daughters of my late brother, Thomas Cartwright, Esq., except £100 each to my executors, and one year's wages to my servants and mourning. I appoint Mrs. Mary Catherine Cartwright, my nieces' mother, and Thomas George Skipworth, Esq., of Newbold Revel, in Warwickshire, my executors, and trustees for my nieces until they come of age or marry; if any of them should die sooner, their share to go to the survivors or survivor.

"ARMYNE CARTWRIGHT."

It appears to have been inclosed and sealed up in a cover; and upon the back of the cover is written in the handwriting of the deceased, "This is my will. A. Cartwright." The will is written in a remarkably fair hand, and without a blot or mistake in a single word or letter. Pleas have been given in on both sides, and there is a pretty full account of the family and connections of the deceased, and her affections, and I think it clearly appears the will is as proper and natural as she could have made, and it is likewise as conformable to her affections at the time. [Here follows a statement of facts concerning various relatives of testatrix and her relations with them; and discussion of a point of evidence.]

The only witness, then, that has given any kind of account of the writing of the will is Charity Thom, who was present at the time;

there was another witness of the name of Gore, but she is dead; therefore Charity Thom is the only person who can give any account of what passed; and the account she gives is extremely material; for I cannot agree with what was said by Dr. Nicholl, that this will relies entirely upon the face of the will itself, and upon the evidence of Mrs. Cottrell, and the proof of handwriting, for its support. I think the evidence of Charity Thom goes very materially to support it; her evidence is in these words; she says to the 15th and 16th articles of the first allegation, "That whilst the said Dr. Battie visited and attended the said deceased, he desired the nurse and the deponent and her other servants to prevent her from reading or writing, as he gave it as his opinion that reading and writing might disturb and hurt her head; and in consequence thereof she, the said deceased, was for some time kept from the use of books, pens, ink, and paper; that, however, some time prior to the writing the will in question in this cause, but precisely as to time the deponent cannot speak, she, the said deceased, grew very importunate for the use of pen, ink, and paper, and frequently asked for it in a very clamorous manner; that Dr. Battie endeavored to dissuade and pacify her, and told her that whatever she wrote he must appear as a witness against, but that if she would wait till she got well he would be a witness for her; that the said deceased continuing importunate in her desire to have pen, ink, and paper, the said Dr. Battie in order to quiet and gratify her consented that she should have them, telling the deponent and Elizabeth Gore, the nurse, that it did not signify what she might write, as she was not fit to make any proper use of pen, ink, and paper; that as soon as Dr. Battie had given his permission that she should have pen, ink, and paper, the same were carried to her; and her hands, which had been for some time before kept constantly tied, were let loose, and she, the said deceased, sat down at her bureau and desired this deponent and the nurse to leave her alone while she wrote, and they, to humour her, went into the adjoining room, but stood by the door thereof so as they could watch and see the said deceased as well as if they had been in the same room with her; that the said deceased at first wrote upon several pieces of paper, and got up in a wild and furious manner and tore the same, and went to the fireplace and threw the pieces in the grate, one after the other; and after walking up and down the room many times in a wild and disordered

manner, muttering or speaking to herself, she wrote, as the deponent believes, the paper which is the will in question; but the deponent further saith that at the time now deposed to the said deceased had not shewn any symptoms whatever of recovery from her disorder, and in the deponent's opinion she had not then sufficient capacity to be able to comprehend or recollect the state of herself, her family, or her affairs, and during the time she was occupied in writing, which was upwards of an hour, she, by her manners and gestures, shewed many signs of a disordered mind and insanity." She says to the 25th interrogatory, "that the deceased was occupied upwards of an hour, nearly two hours as well as the deponent can at this distance of time recollect, in making the will in question; that is, from the time of the pen, ink, and paper being given her, until she left off writing; that the respondent and Elizabeth Gore, the nurse, went out of the room into the adjoining room, and left the said deceased alone in the room, but not out of their sight; that she said she was going to write, but the respondent does not recollect whether she said she was going to make her will, but the respondent understood that she was writing a will; that when the said deceased was left in the room by herself she was so agitated and furious that the respondent was very fearful she would attempt some mischief to herself, but she did not do any; that a candle was given to the said deceased to seal what she had written, but the respondent cannot recollect what length of time the candle was by her; that the respondent and also the nurse were always cautious of trusting a candle near the said deceased, but on this occasion they did permit her to have a candle notwithstanding she shewed many marks of derangement and insanity at the time, this respondent and the nurse being at hand and watching her to prevent any mischief; that the said deceased seemed very earnest in what she was about, but by no means closely settled, as whilst she was writing she frequently started up and walked up and down the room in an agitated manner; that it was not customary to untie the said deceased's hands, or to leave her alone when she desired it, at times when she was greatly agitated and disordered, although sometimes in consequence of her earnest intreaties the respondent and the nurse would untie her for a little, and on the occasion now particularly deposed to she was so untied in consequence of the permission which Dr. Battie had given her to have pen, ink, and paper, but she was not

left alone, as the deponent and the nurse stood at the door of an adjoining room behind the said deceased, but not above two or three yards distant from the bureau where she sat to write."

The fact then, as it appears by the evidence of this witness, is, that the paper was written by the testatrix herself, no other person being present but the witness who gives the account and Elizabeth Gore, who is since dead, neither of whom gave her any manner of assistance; and she tells you, that the deceased having first of all shewn great eagerness and anxiety for pen, ink, and paper, did write this will the moment she obtained them without any assistance from any one; but it is said that the condition of the deceased at this time was such that she was utterly incapable of doing that or any other legal act, because it must be rational. They have certainly completely proved that the deceased was early afflicted with the disorder of her mind, I think about the year 1759, and she continued under the influence of that disorder pretty near two years, and after that she returned to her father's house being supposed to be perfectly recovered, and that she continued to reside there from that time to his death; that after that being in possession of her fortune she went about the year 1768 to housekeeping herself, and continued so to do as a rational person till 1774, and in the month of November in that year she went on a visit to her relation, Lord Macclesfield, at Shirburn in Oxfordshire; that on the 26th of November she returned to London in a disordered and disturbed state; at first she was attended by a physician, Dr. Fothergill, who found it was a disorder of the mind, and what he had not directed his attention or study to. It is proved that in the latter end of January or beginning of February, 1775, Dr. Battie was called in, and he treated her as an insane person, and sent a nurse to take care of her in the way they always do send nurses to patients disordered in mind. In general her habit and condition of body and her manner for several months before the date of the will was that of a person afflicted with many of the worst symptoms of that dreadful disorder, and continued so certainly after making the will, which was the 14th of August, 1775. They have certainly made out that. Now what is the legal effect of such proof as this? Certainly not wholly to incapacitate such a person, and to say a person who is proved to be in such a way was totally and necessarily incapacitated from making a legal will. I take it the rule of

the law of England is the rule of the civil law as laid down in the second book of the Institutes,[1] "furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur." There is no kind of doubt of it, and it has been admitted that is the principle. If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent like all human creatures was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it; that is the law; so that in all these cases the question is whether, admitting habitual insanity, there was a lucid interval or not to do the act. Now I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done the whole case is proved.[2] What can you do more to establish the act? because, suppose you are able to shew the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from Swinburne does state it to be so. The manner he has laid down is (it is in the [3]

[1] Instit., lib. 2, tit. 12, sec. 2.

[2] Sir William Wynne, who laid down the rule in Cartwright v. Cartwright, did in fact look into all the grounds and circumstances to see how far the act was the result of the deceased's own will and intention. "That Sir William Wynne did not consider every rational act rationally performed as sufficient to prove a lucid interval, we may collect from what is stated in a subsequent part of his judgment, in which he refers to cases where testamentary acts of a rational character were set aside. So that it is not every rational act rationally done, which, under all circumstances, is sufficient to constitute a lucid interval; it was the particular manner in which the act was done in that case which led Sir William Wynne to the conclusion that there was a lucid interval." . . . . —Chambers v. Queen's Proctor, 2 Curt. 415 (447).

[3] Swinburne, Part. ii., sec. 3.

part in which he treats of what persons may make a will), says he, the last observation is, "If a lunatic person, or one that is beside himself at some times but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good, yea although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless I suppose that if the testament be wisely and orderly framed the same ought to be accepted for a lawful testament." Unquestionably there must be a complete and absolute proof the party who had so formed it did it without any assistance. If the fact be so that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentlemen could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month; I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended; I look upon it if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient. What does appear to be the case from the evidence of these witnesses? As to Charity Thom, who seems to me to be the principal witness, she gives an opinion of her own, and that opinion is against the validity of the act, and she expressly says over and over that the deceased at the time this was done was not sane and was not capable of knowing what she did; that is the result of her evidence. The Court, however, does not depend upon the opinion of witnesses, but upon the facts to which they depose. All the facts which are deposed to (it does appear to me) are sane; the witness's opinion arising from her observations does not give any foundation at all for saying the testatrix was insane at the time of making the will; her opinion that the deceased was insane at such time was founded on bodily affections which were extraneous. What is the fact? she says that the deceased whilst employed about the act rose frequently and walked backwards and forwards about the room, that she did not set down closely to the business, that she

started up, and that she tore several papers and threw the pieces into the grate, then wrote others, and did not appear to her to act in such a way as a person who was calm would do. In my apprehension, it appears from this account her manner of doing it was this: she wrote several papers, and if she saw any mistake whatever trifling she was dissatisfied and probably vexed she did not write in such a way as fairly to answer her own intention; the paper itself has no mark of irritation; a more steady performance I never saw in my life; and it seems hardly consistent that a person wild and furious and in such a degree of insanity as she is stated to be should write in such a way. It seems to me a very extraordinary thing, but whatever outward appearance there was it had no effect on the writing itself; she has wrote it without a single mistake or blot or anything like it. What is the construction? that she was endeavoring to write her will, which she had taken a determination to do; that she made mistakes and destroyed those papers in which she had made them, that she knew how to correct them, and did correct them, and at length wrote and finished as complete a paper as any person in England could have done. Is this insanity? In my apprehension, it is not; it seems to me she was vexed at her mistakes, which I think shews that she had at that time her senses about her, and I think it appears likewise she was not then in fact in the disturbed condition she was before and after. They say they were generally forced to keep the strait waistcoat upon her, that even then she would thrust out her arms if she could, and strive to thrust her fingers in their eyes, and in short do every thing that would do mischief. Is there any mischief in the present case when the strait waistcoat is taken off? Nothing like it; as soon as it is taken off she says, "Give me pen, ink, and paper"; and when it is given her she says, "Leave me, for I am going to write"; and they go out of the room; she is not disturbed at their watching her, but pursues her own intention and completes the paper; she enquires the day of the month, and an almanack is given to her by one of the nurses who was watching her, and the day of the month was pointed out to her; she then calls for a candle; and they say they used to be cautious not to trust her with a candle, and were forced to hold it at a distance from her if she read the newspaper; but still in this case they give her a candle that she may use it in order to seal the paper; no harm was done

of any kind, and none attempted; everything that was done was for the purpose of completing the act; and am I to conclude she was insane, because she might have bodily affections, irritations of nerves, when everything which was rational is done, and as collectedly and as exactly as any person of the clearest sense would have done, and of her own head entirely. The gentlemen have said all this is mere form. Is it mere form that a person so situated as she was should of her own accord write a will containing the most rational disposition of her property, leaving all her fortune to her nieces, the daughters of her deceased brother who were the most natural to her, omitting her nephew who was possessed of a large fortune? Is it mere form that she should appoint for her executors and trustees the mother of those nieces, and her nearest relation by the father's side, describing accurately the place where he lived, and that she should create a survivorship amongst them if any should die before twenty-one? Is this only form? It is the very essential part and substance of a will, and that will as rational a will as she or any other person could have made. Therefore, taking the fact to be that it was done of her own accord, it leaves nothing to be proved; that being established puts the matter beyond all possibility of doubt, and I think there can be no question but that she had a legal capacity; but, say they, we can hardly admit this is quite such a paper as it appears, and that it is the mere spontaneous act of the testatrix herself; they surmise, and to be sure it is as groundless a surmise in point of evidence as possible, that it was done at the suggestion of Mrs. Cottrell, but it appears that she was at that time out of town and had been so for a month before; but is the Court to suppose that without evidence, and is there anything to support it? certainly not, and I cannot presume any such thing. If you have a mind to prove this was by the suggestion of Mrs. Cottrell, you may; if you do not, I must take it to be, what appears from the evidence, the pure and spontaneous act of the party herself, and that Mrs. Cottrell knew nothing of it till she was informed of it. [Sir William Wynne here examines further evidence which he finds conclusive in showing that testatrix had frequent lucid intervals besides the one in question. He also states and examines the cases of Attorney-General v. Parnther,[1]

[1] See 3 Brown C. C. 441.

Clarke v. Lear,[1] Coghlan v. Coghlan, and Greenwood v. Greenwood, and then proceeds as follows:]

I am of opinion in this case that the deceased by herself writing the will now before the Court hath most plainly shewn she had a full and complete capacity to understand what was the state of her affairs and her relations, and to give what was proper in the way she has done. She not only formed the plan, but pursued and carried it into execution with propriety and without assistance. In my apprehension that would have been alone sufficient, but it is further affirmed by the recognition and the delivery of the will. Therefore, under all these circumstances I have no doubt in pronouncing this to be the legal will of the deceased.

INSANITY PROVED.—WHEN PRESUMED TO CONTINUE.

Sarepta Hix v. Isaac Whittemore.

MASSACHUSETTS SUPREME JUDICIAL COURT, 1842.

(4 Met. 545.)

WRIT OF ERROR to reverse a judgment recovered by the defendant in error against the plaintiff in error, at the December term, 1837, of the Court of Common Pleas. The original writ against the plaintiff in error was served on the 20th of November, 1837, by leaving a summons at her last and usual place of abode in Athol. The error assigned was, that at the time of the service of the said original writ, and at the time of the rendition of said judgment, the plaintiff in error was insane. Issue to the country.

At the trial the insanity of the plaintiff in error, in the spring of 1837, either resulting from or connected with a violent disease, was both proved and admitted. Evidence was offered by the defendant in error tending to prove that she (the plaintiff in error) recovered her reason during the following summer, and continued sane till she was carried to the house of correction in Worcester, on the 10th of November, 1837; and evidence was offered by the plaintiff in error, tending to prove that she continued insane during that period.

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[1] See *ante*, p. 23.

The jury were instructed "that the insanity of the plaintiff in error, in the spring of 1837, being proved and admitted, the burden of proof was on the defendant in error to show that she had so perfectly recovered her mind as to be the proper subject of a suit at the time of the service of the original writ upon her; and that if the jury were satisfied that she had recovered her mind during the summer or autumn of 1837, the burden of proof was then shifted upon her to show the insanity at the time of the service of the writ and the rendition of the judgment in the original action."

The jury returned a verdict for the plaintiff in error, and the defendant in error alleged exceptions to the said intructions.

Dewey, J.—Every man being presumed to be sane, till the contrary is shown, the burden of proof certainly rests, in the first instance, on the party alleging the insanity.[1] How far this burden is changed by the mere fact of proof of insanity at a particular period is the precise point of the present inquiry.

The general expressions in some of the books that treat of the subject are certainly broad enough to warrant the instructions given in the present case. See 3 Stark, Ev. 1709; Greenleaf on Ev., sec. 42; Mathews on Presump. Ev. (Amer. ed.) 20, 21. But a careful analysis of the principles upon which presumptions are allowed to have force and effect, will show that the proof of the insanity of an individual, at a particular period, does not necessarily authorize the inference of his insanity at a remote subsequent period, or even several months later.

The force of presumptions arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts. Now neither observation nor experience shows us that persons who are insane from the effect of some violent disease, do not usually recover the right use of their mental faculties. Such cases are not unusual, and the return of a sound mind may be anticipated from the subsiding or removal of the disease which has prostrated their minds. It is not, therefore, to be stated as an unqualified maxim of the law, "once insane, presumed to be always insane"; but reference must be had to the peculiar circumstances

[1] For a divergence of authority on this point, see Index, "Burden of Proof."

connected with the insanity of an individual, in deciding upon its effect upon the burden of proof, or how far it may authorize the jury to infer that the same condition or state of mind attaches to the individual at a later period.

There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity and that which may be only temporary. The existence of the former, once established, would require proof from the other party to show a restoration or recovery; and, in the absence of such evidence, insanity would be presumed to continue. But if the proof only shows a case of insanity directly connected with some violent disease, with which the individual is attacked, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy, and not content himself merely with proof of insanity at an earlier period.

Such we take to be the rule, as founded in reason and sanctioned by the decided cases. Thus in Cartwright v. Cartwright (1 Phillim. 100), it was held that "where *habitual* insanity in the mind of a person is established, there the party who would take advantage of the fact of an interval of reason must prove it," taking the distinction which we have mentioned; 1 Williams on Executors, 17, 18; Swinburne, in his Treatise on Wills, Part II., sec. 3, states the general presumption of law, that a testator, who is proved to have been void of the use of reason and understanding, continues in the same state. But, among other exceptions to this rule, he mentions the case of a testator's falling "into some frenzy, upon some *accidental cause* which is afterwards taken away." And this exception is recognized in 1 Collinson on Lunacy, 55, and Shelford on Lunatics, 275. Lord Hale says *accidental* madness proceeds sometimes from the violence of a disease. 1 Hale P. C. 30.

New trial granted.

DRUNKENNESS.—WHAT PRESUMPTION OF INCAPACITY.

Ayrey and others v. Hill.

PREROGATIVE COURT OF CANTERBURY, 1824.

(2 Add. 206.)

The deceased, Peter Hurman, otherwise Efford, died on the 5th of August, 1821, leaving a will bearing date 25th of June in that

year, the validity of which is the point in issue. It makes considerable provision for the family of Mr. Pike, one of the executors, devises and bequeaths a freehold estate for life, together with the residue of the testator's personalty for life, to Lucy Hill, his niece and sole surviving next of kin, and bequeaths certain other sums to her husband if he survive her, and to charity, and makes provision for three executors. The personalty bequeathed by this will is stated to amount in value to about £5,000, and the realty devised to between £5,000 and £10,000.

JUDGMENT.

Sir JOHN NICHOLL (after stating the facts).—This instrument, such as I have described it, is propounded by the executors, and is opposed by Lucy Hill, the testator's niece, and only known relation; her alleged ground of opposition being, in a word, the asserted testator's *incapacity*. Her allegation, responsive to a *condidit*, pleads, generally, in the third article, that the deceased had long been subject to mental derangement, more particularly from about the middle of the year 1817; of which it furnishes a variety of (supposed) instances in the fifteen succeeding articles; summing up the whole by pleading, in the nineteenth article, that the deceased was not of testamentary capacity on the 25th day of June, 1821, but that he was in the custody, and under the control, of the executors (one or all) at that time, upon whose sole suggestion the will in question was, *de facto*, made and signed by the deceased. To this it is answered, on the part of the executors, that the deceased was never insane; for that he conducted himself rationally at all times, when not under the excitement produced by spirituous liquors, to the moderate use of which, it may be stated, once for all, as an admitted fact in the cause, that the deceased had been addicted for a number of years.

Now this being, in substance, the case on both sides, it appears to me that the testimony of Mrs. Hill's own witnesses fails to make out a case of (*proper*) insanity, or mental derangement. They speak to the deceased's extravagant conduct, indeed, in a variety of instances; but they admit him in, at least, by far the greater part of these, to have been intoxicated at the time; when it does seem that he not only talked wildly and incoherently, but that he acted, and conducted himself, in all respects, very like a

madman. Even Fagg, the witness who deposes most strongly in this particular, concludes by stating the deceased, in her apprehension, "*a mad drunken fool*"; obviously connecting, as appears by this phrase, in her view of the case, his *supposed* insanity, with his admitted habits of gross intoxication. On the contrary, however, it is pleaded, and proved, that the deceased at no time was under any control as to the management of his person or property; that he received rents; made payments; transferred stock; drew drafts; settled accounts; bought and sold property; in a word, that he was perfectly *sui juris* to the last, with respect to the conduct both of himself and his affairs, in all particulars.

The testator's case then appears to the Court to be that of a person not (*properly*) insane or deranged; but to be that of a person addicted to a species of ebriety, which, during its subsistence, *frequently* produces, and is proved, in the present instance, to have *actually* produced, upon the subject of it, effects very similar to those which insanity, or mental derangement (properly so called) would, or might, have occasioned. In other words, the deceased appears to the Court, not in the light of a madman, but in that of a person habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted, in most respects, very like a madman.

Now, viewed as with reference to the point at issue, the cases in question, notwithstanding their apparent similarity, are subject, in my judgment, to very different considerations. Where actual (*proper*) insanity is proved to have once shewn itself, either perfect recovery, or, at least, a lucid interval at the time of the *making*, must be *clearly* proved, to entitle any *alleged* testamentary instrument to be pronounced for as a valid will. Either of these, however, the last especially, is highly difficult of proof, for the following reason: Insanity will often be, though *latent;* so that a person may, in effect, be completely mad or insane, however, on some subjects, and in some parts of his conduct, *apparently*, rational. But the effects of drunkenness or ebriety only subsist, whilst the cause, the excitement, visibly lasts: there can scarcely be such a thing as *latent* ebriety: so that the case of a person in a state of *incapacity* from mere drunkenness or ebriety, and yet *capable*, to all outward appearance, can hardly be supposed. Consequently, in the last, which, in my judgment, is *this*, description of case, all

which requires to be shewn is the absence of the excitement at the time of the act done; at least, the absence of the excitement in any such degree as would vitiate the act done; for I suppose it will readily be conceded that, under a mere slight degree of that excitement, the memory and understanding may be, in substance, as correct as in the total absence of any exciting cause. Whether, where the excitement in *some degree* is proved to have actually subsisted at the time of the act done, it did or did not subsist in the *requisite* degree to vitiate the act done, must depend, in each case, upon a *due* consideration of all the circumstances of that case itself, in particular; it belonging to a description of cases that admits of no more definite rule, applicable to the determination of them, than the one now suggested, that I am aware of.

In this view of the question before the Court, it must be obvious, that the result will depend upon the deceased's state and condition *at the time* (to be collected, *principally*, from what passed *at the time*) of his giving instructions for, and signing, the instrument now propounded as, and for, his last will. But previous to considering this, it may not be improper that the Court should briefly notice one or two outlying circumstances.

[Here Sir John Nicholl examines the provisions of the will in the light of the testimony, and finds them in fact reasonable and prudent. He also finds that the due execution of the will is satisfactorily shown, and that there was no undue influence; on the point of intoxication at the very time of making the will, one of the witnesses testified that testator sipped whiskey while thus engaged; that he spoke inarticulately; that Mr. Ayrey, who was present, said at the time, "I think he is tipsy," or "I think he is drunk"; and that he himself "thought that the deceased was then, to a certain extent, affected by drinking spirituous liquors," though he believed him to have testamentary capacity. The Judge finds no sufficient proof of incapacity from drunkenness.] It appears to me to be the will of a free and capable testator; and, as such, I pronounce for it.

BELIEF IN WITCHES.

Matter of Vedder.

SURROGATE'S COURT, ALBANY COUNTY, NEW YORK, 1888.

(6 Dem. 92.)

Application for probate of a paper purporting to be the last will of Eliza Ann Vedder, who died January 19, 1887, at the age of seventy-seven years, by which nearly all the property of the decedent was devised and bequeathed to her husband, the proponent here. The nephews and nieces of decedent oppose the probate on the ground, among others, that the testatrix was not of sound mind, memory, and understanding. There was no issue of the marriage. The will in question was executed in August, 1883, at the house of decedent and proponent. At the same time and place, Mr. Vedder, the proponent, made and executed a will, whereby he gave all his property to his wife, the testatrix here. Among the principal facts proved by the contestants, were the following: That the testatrix was very old and in a gradually failing physical condition; that she put irons in the cream, and marked the bottom of the churn with the sign of the cross, to make the butter come; that she said she could not keep her horses fat because the witches rode them at night; that she believed in witches and witchcraft; that she told a neighbor that she had seen a headless horseman riding across her field; that she told another neighbor that her crying child was bewitched, and that if she would search its pillow she would find a hard bunch of feathers therein, which was the witch, and that she should boil this bunch at night in a pot, and that at midnight she would hear some one knock,—that she should not answer, and in the morning the body of the witch would be found outside the door; that she told a certain woman to put live coals and a red garter under her churn, and that the butter would come; that, once upon a time, she took her nephew (a contestant) to dig for gold on her farm, and had him carry a red rooster under his arm for good luck, and that they dug, and got no gold; that she said she desired to be robed like the angels when she died; that all these strange things were said and done by her during the last quarter of a century of her life; and the witnesses who testify of these things believed she was irrational because of them, although some of them said that in her ordinary affairs she was not a foolish woman.

On the other hand, the proponent proved that, in the performance of her household duties and farm business, the testatrix was a prudent, sensible woman; that she kept her house neat and clean; that, within a few years before her death, she was a party to an agreement to let the farm on shares, and that she gave wise directions as to how it should be worked; that she was a life-long member of the Reformed Dutch Church in her neighborhood, and attended services regularly until the last two or three years of her life, when she was disabled by rheumatism and other bodily infirmity; that she frequently read her Bible and prayed with her pastor; that her married life was happy and peaceful, and that respectful and affectionate relations existed between her husband and herself; that a belief in visions was a part of her religious faith; that she had an intense way of expressing her religious experience; that many of her expressions were borrowed from the Bible; that she accepted the sacred Scriptures as the inspired word of God; that she believed in their inspiration as declared in the creed of the Reformed Dutch Church; and the witnesses who testified to these things believed her to have been rational. The subscribing witnesses were clear and emphatic in their belief and opinion that the testatrix was of sound mind and memory when she executed the will.

Woods, S. (after stating the foregoing and many other facts of similar tenor).—There is no evidence whatever to show that any or all of these beliefs, delusions, eccentricities, or peculiarities had the slightest connection with, or influence upon, her testamentary act here in question. [Here follows a discussion of the weight of certain expert testimony, of the New York rule of testamentary capacity, and of numerous authorities, and of the reasonableness of the will in question. Concerning the belief of the testatrix in witches, the Surrogate then says:]

Scarcely two centuries ago the great body of Christians believed in witchcraft, and, under the solemn sanction of the law, hundreds of poor old ladies, condemned as witches, were tortured and died amidst the blazing fagots. It is said that during the Long Parliament hundreds were even thus put to death in England. The lurid light of these judicial fires is spread on the pages of American history. Commanding intellects—Coke, the mighty Bacon, wise Sir Matthew Hale, Martin Luther, John Wesley, Cotton Mather—believed in witchcraft.

Profound theologians contended that a disbelief in it was rank heresy, and they cited Scripture to their purpose: "Thou shalt not suffer a witch to live" (Exodus xxii. 18). [Other references to the Bible are here given.]

The Bible was the book of books to the aged testatrix. Its lessons had sunk deep in her heart, its language was often on her lips, it was to her the precious fountain of God's inspiration. It is not passing strange that the ancient belief in witchcraft survived in her, and found expression and action as has been recorded. I am persuaded that her beliefs, peculiar and strange in many respects, in the clearer light of to-day, did not disqualify her from disposing of her property by will, and I accordingly hold that she was *compos mentis*, and that the paper propounded as her will should be entitled to probate.

INSANE DELUSIONS AFFECTING WILL.

Matter of Lockwood.

SURROGATE'S COURT, ALBANY COUNTY, NEW YORK, 1889.

(28 N. Y. St. Rep. 164.)

Woods, S.—Seley Lockwood died at South Westerlo on the 20th of October, 1888, aged seventy-two years. On the 16th of February, 1880, he executed the proposed will, with the formalities required by law, in the presence of two witnesses who had seen him only a few times and knew very little of him or his antecedents. His estate consisted of personal property only, deposited in savings banks, and which had been so kept for many years. A considerable portion of it was in the National Savings Bank at Albany, and the other books of his bank deposits were left thereat by him for safe keeping. Mr. Stephens, the executor named in the proposed will, is the secretary of that bank.

In the will Mr. Lockwood bequeathed one-half of his property to the State Lunatic Asylum at Utica, and the other half to the orphan asylum at Albany, and he inserted therein a provision to this effect: "I give and bequeath to my executor, Albert P. Stephens, of Albany city, a sum from my estate up as high as one-quarter, large enough to be over and above any bribe that may be offered by my brothers, sisters, and children for the redemption of this will and their heirship to my estate."

This will is a holograph, entirely in decedent's handwriting, but as he had executed another will in the presence of one of the subscribing witnesses to this one but a short time before, and had had one drawn about that time by a Mr. Robbins, the contents of which do not appear, it may have been copied therefrom.

Decedent had resided most of his life in the neighborhood where he died. He once went South, but to what point does not appear. At another time he went West, near Kansas City, and at another time, from January 10 to October 9, 1849, when about thirty-three years of age, he was an inmate of the insane asylum at Utica, having been taken there by his brother George, and by one Henry Myers, who is now dead. On the 9th day of October, 1849, he left the asylum in company with his brother "improved." It does not appear that he ever entirely recovered, and I think it quite evident that he never did.

He inherited about $7,000 or $8,000 from his father and a sister, and at the time of his death he had over $23,000 on deposit in the savings banks. He was a very close, penurious man. He made sharp bargains, wore poor clothing which he made himself, and it is said that he usually wore about three suits of clothes at one time. He boarded about among his relatives, paying twenty shillings a week for his keeping, for which he always took receipts which he himself made out.

It appears that his brothers and sisters joined with him in deeds of land which they inherited with him, he receiving the agreed consideration, and the money which he inherited was paid directly to him. It does not appear to have been claimed that he was deranged as to his mere pecuniary transactions. He was evidently quite sane, methodical, and sensible upon such matters. But I do not see how such transactions reflect upon his peculiarities and delusions upon entirely different subjects. His usual business transactions, as shown upon the trial, were brief, simple, and all of a similar character; inquiries as to deposit of money, deposits thereof, occasionally changing the deposits and receipts of interest. It appears that he invested some money in a savings bank at Kansas City which failed, and after his return home Mr. Stephens, of the National Savings Bank, collected one or more dividends for him from the receiver of the broken bank.

The peculiarities and delusions of the decedent were numerous

and striking. He took borax "to weld up his inwards"; he refused to take food until others had taken of it, for fear it had been poisoned and would kill him; he asserted that chloroform angels had saturated his bed clothing to kill him; that his relatives and Indians were endeavoring to shoot him; he usually put a quantity of salt into his tea to destroy the poison which he claimed had been put therein to kill him; he made ginger tea, and if bubbles arose in the boiling of it, he threw it away, because he said the bubbles showed it was poisoned; that he had been accustomed to drink milk, and suddenly refused to use any more, stating that that offered to him had been poisoned, and that milk was an article which could be easily poisoned; he said that his relatives with whom he was boarding intended killing him with an axe-helve which was being polished, and also with a horse file; though the plates from which he ate were clean, he usually blew on them to throw off the poison which he supposed had been placed thereon for him to take; he refused to drink tea which he did not see poured out, though the tea had been prepared by his own sister; he busied himself for hours, sometimes for half a day at a time, under the floor of his house sticking an old bayonet into the earth, killing "devils," as he said; he claimed that a drain from the house had been dug for a grave for him, and that his relatives intended to kill him and to bury him in it; for half a day at a time he dug holes about two feet deep in the earth around the house, pouring water therein to drown out the devils, and when the existence of the devils was questioned by the hired man of his father, he flew into a rage and threatened to kill him; he usually carried a pistol for the purpose of protecting himself from his enemies; he frequently declared that his relatives were banded together to kill him and thus obtain his property, and that this was revealed to him by the birds at night; he asserted that while in the South he built a house without windows or doors, sliding a board back to get in and then replacing it; that he built it thus so that the "gang" could not get in; he said that he invented the first steamboat and the first engine that was ever built; he would sit in a rocking-chair and rock violently, alternately laughing and crying, with his hands spread over his face "peeking" through his fingers; he said he saw a man coming out of the cellar of his brother Amiel's house, when he was stopping there, to kill him for his money;

and that his brother's wife was the worst of them; he frequently cleaned out the wash-dish after it had been cleansed, claiming that it had been poisoned. There were numerous other acts and things of a similar character, but those hereinbefore enumerated are sufficient to show decedent's condition of mind.

Though displaying the usual intelligence of people of his condition in life relative to business transactions, I am satisfied that at the time of going through the formalities of executing this will, and for many years previous, decedent was laboring under the insane delusion that his relatives and next of kin, who would inherit his property if he died intestate, were his enemies and were combined to kill him in order to obtain his property.

I am persuaded that the alleged will must be rejected, in that it is unnatural and unreasonable and strange upon its face. The provision for preventing the bribing of the executor (a gentleman of the very highest character), the disinheriting of every relative, and the giving of his estate to charities, with one of which he is not shown to have any knowledge, might not *per se* be sufficient to justify me in declaring the will invalid, but coupled with his delusions and his condition of mind, require such a determination.

Though the subscribing witnesses give their opinion that he was of sound mind when he executed the will, the transaction of execution was very brief. They knew him but slightly, and their testimony must be weighed in connection with the light thrown upon his mental condition and delusion by all the evidence in the case.

If a will be made and executed under such a delusion which operated upon the decedent, and induced him to make it, it cannot be upheld, though the testator's general capacity be unimpeached. Schouler on Wills, secs. 159, 161; Morse v. Scott, 4 Dem. 507; Matter of Dorman's Will, 5 Id. 112.

If it be evident that the dispository provisions in the will were the result of and were caused by such a delusion, the instrument cannot be supported as such. Matter of McHugh's Will, 17 N. Y. Week. Dig. 502; Seamen's Friend Society v. Hopper, 33 N. Y. 624–5; Clapp v. Fullerton, 34 Id. 190; Keeler's Will, 12 N. Y. State Rep. 155–7; Weil's Will, 16 Id. 1.

The rule is so well settled that it would hardly be proper or allowable to extract from these cases at length to prove it. It is true that the case of Keeler's Will was reversed, 20 N. Y. State Rep.

439, but it was on the ground that the testator's belief in Spiritualism was not sufficient to invalidate the will, that his declarations of hostility to his relatives were merely declarations of aversion and dislike, and that in bequeathing all his property to his wife, he was doing a just act as against those who had no just claim upon his bounty. The court, however (page 443), recognizes the correctness of the rule that if the testator was in fact influenced in making his will by an insane delusion as to his relatives, the will would have been invalid.

This case is quite unlike that of Vedder's Will, 6 Dem. 92, decided by me in 1888. In that case I held that:

"There is no evidence whatever that any or all of these beliefs, delusions, eccentricities, or peculiarities had the slightest connection with or influence upon the testamentary act here in question," and further "that mental capacity is to be measured by its relations to the testamentary act"; and "that a person having any insane delusion relating to the property, persons concerned, or the provisions of the will, is incapable, while delusions which in no way relate to these do not, as a matter of law, incapacitate."

It will thus be seen that I was careful in that case to lay down precisely the rule which I have applied in this.

The probate of the alleged will must be refused.

MENTAL CONDITION.—TESTATOR'S DECLARATIONS BEFORE AND AFTER EXECUTION.[1]

Waterman and others against Whitney and others.

NEW YORK COURT OF APPEALS, 1854.

(11 N. Y. 157.)

Application for probate of will of Joshua Whitney. Appeal.

Selden, J.—The principal question presented by the bill of exceptions in this case is, as to the admissibility of the declarations of the testator made after the execution of the will.

The subject to which this question belongs is of very considerable interest, and one upon which the decisions are to some extent in conflict. Much of the difficulty, however, has arisen from the

[1] See also the cases on declarations of testator on issue of undue influence, *post*.

omission to distinguish with sufficient clearness between the different objects for which the declarations of testators may be offered in evidence in cases involving the validity of their wills. It will tend to elucidate the subject to consider it under the following classification of the purposes for which the evidence may be offered, viz.: 1. To show a revocation of a will admitted to have been once valid. 2. To impeach the validity of a will for duress, or on account of some fraud or imposition practised upon the testator, or for some other cause not involving his mental condition. 3. To show the mental incapacity of the testator, or that the will was procured by undue influence. The rules by which the admissibility of the evidence is governed, naturally arrange themselves in accordance with this classification. They have, however, been considered in most of the cases without regard to it; and hence much of the apparent conflict among them will disappear when the proper distinctions are taken.

To show the state of the authorities, therefore, and what the differences really are between them, it is necessary to arrange the cases according to this arrangement of the objects for which the evidence is given. In referring, however, to those belonging to the first of these divisions, it is proper to premise that the revocation of a valid will, is a matter which not only in England, but in this State, and in most if not all the other States, is regulated by statute: and these statutes are substantially the same; those in this country being for the most part taken from the English statute of frauds. Most if not all these statutes require either a written revocation executed with the same formalities as the will itself, or some act amounting to a virtual destruction of the will, such as burning, tearing, obliterating, etc., accompanied by an unequivocal intention to revoke it. Mere words will, in no case, amount to a revocation.

Under these statutes, therefore, the only possible purpose for which evidence of the declarations of the testator can be given upon a question of revocation, is to establish the *animo revocandi;* in other words, to show the intent with which the act relied upon as a revocation was done. The cases on this subject are, in the main, in harmony with each other, and in general entirely accord with the view here presented. I will refer to a few of the most prominent. Bibb v. Thomas (2 W. Black. 1044) was a case of revoca-

tion by throwing the will on the fire. The will was not consumed, but fell off the fire, and was taken up and saved by a bystander without the knowledge of the testator. The court held the revocation complete. The case was held to depend upon the intent with which the will was thrown upon the fire; and to establish this intent the declarations of the testator, both at the time of the transaction and *afterwards*, were received. So far as regards the declarations which accompanied the act, this was in accordance with general principles, and with all the other cases; but I apprehend that the declarations of the testator made after the transaction was over, could not, in such a case, be properly received. This distinction, however, was not taken, and the question did not arise. Doe v. Perkes and others (3 Barn. & Ald. 489) was a similar case, in which the declarations of the testator showed that he had abandoned the intention to destroy the will before the work of destruction was complete. No declarations were proved in this case except those which were clearly a part of the *res gestae*. In the case of Dan v. Brown (4 Cowen 483) it was insisted by the counsel that upon a question of revocation the declarations of the testator, made either before or *after* the act relied upon, were admissible, as well as those which accompanied the act itself; but the court held that declarations accompanying the act, such as were part of the *res gestae*, were admissible for the purpose of showing the *quo animo;* but that no others could be received. In Jackson v. Betts (6 Cowen 377) the main question was, whether a will proved to have been once properly executed, but which could not be found after the death of the testator, had been canceled or destroyed and thus revoked, or whether it continued in force; and evidence was offered of the declarations of the testator during his last sickness, as to the existence of his will, and the place where it would be found. The Supreme Court held the evidence not admissible. The case ultimately went to the Court of Errors, and the Chancellor there expressed doubts as to the correctness of the decision of the Supreme Court upon the point, but did not overrule it. (See 6 Wend. 173.)

I consider these cases as establishing the doctrine that upon a question of revocation no declarations of the testator are admissible except such as accompany the act by which the will is revoked; such declarations being received as a part of the *res gestae*, and for the purpose of showing the intent of the act.

The only direct decision to the contrary which has fallen under my observation is the case of Durant v. Ashmon (2 Rich. S. Car. R. 184). This case, however, is in conflict with authority as well as with principle. The fact to be proved in such cases is the act claimed as a revocation, together with the intent with which it was done; and all declarations of the testator which do not accompany the act are to be regarded as mere hearsay, and should be treated as such.

In regard to the second class of cases, viz., where the validity of a will is disputed on the ground of fraud, duress, mistake, or some similar cause, aside from the mental weakness of the testator, I think it equally clear that no declarations of the testator himself can be received in evidence except such as were made at the time of the execution of the will, and are strictly a part of the *res gestae*. Jackson v. Kniffen (2 John. 31) is a leading case on this subject. In that case the plaintiff claimed as heir at law; the defendant under the will of David Kniffen. The plaintiff gave evidence tending strongly to show that the will was obtained by duress, and offered to follow this up by proof of the testator's declarations, some of them made *in extremis*, that the will had been extorted from him by threats and duress. The court held the evidence inadmissible. THOMPSON, J., says: "This will might have been executed under circumstances which ought to invalidate it, but to allow it to be impeached by the parol declarations of the testator himself, would, in my judgment, be eluding the statute, and an infringement upon well settled and established principles of law." In Smith v. Fenner (1 Gallison 170), one of the questions was, whether the will of Arthur Fenner had been obtained by fraud and imposition, and the plaintiffs offered to prove declarations of the testator to that effect, made before and at the time of making the will and *immediately* afterwards. He also offered to prove similar declarations made afterwards at different times during the last years of his life. The court held that the declarations made *before* as well as at or so near the time as to be a part of the *res gestae* were admissible, but not those made afterwards. So far as this case seems to justify the reception of declarations made *before* the execution of the will to prove fraud or duress, I think it inconsistent with principle, as well as opposed to the best considered of the modern cases. In other respects it is in accordance with both. In the case of Stevens v.

Vancleve (4 Wash. C. C. R. 262), it was made a question whether a will had been duly executed; and as bearing upon that question, the defendant's counsel offered to prove that the uniform declarations of the testator in favor of the defendant, who was the devisee, had been consistent with the disposition of the will in 1817. The evidence was rejected. WASHINGTON, J., said: "The declarations of a party to a deed or will, whether *prior or subsequent* to its execution, are nothing more than hearsay evidence, and nothing could be more dangerous than the admission of it, either to control the construction of the instrument, or to support or destroy its validity." In Moritz v. Brough (16 Serg. & Rawle 403) the Supreme Court of Pennsylvania held the declarations of the testator, whether made before or after the execution of the will, inadmissible for the purpose of proving fraud or coercion, although it is there conceded that for the purpose of showing the mental imbecility of the testator such evidence might be received. It was also unanimously decided by the Court of Errors of Connecticut, in the case of Comstock v. Hadlyme (8 Conn. 254), that the declarations of the testator, unless a part of the *res gestae*, were not admissible for any purpose except to prove his *mental condition* at the time of executing the will. The same doctrine is held by the English courts. In Provis v. Reed (5 Bing. 435) it was sought to impeach the validity of the will by proving the declarations of the testator made after its execution. The evidence was rejected. BEST, Ch. J., said: "It has been insisted that declarations of the testator were admissible in evidence to show that the will he had executed was not valid; but no case has been cited in support of such a position, and we shall not, for the first time, establish a doctrine which would render useless the precaution of making a will."

These cases must, I think, be sufficient to establish the position that declarations of a testator, made either *before or after* the execution of the will, are not competent evidence to impeach its validity on the ground of fraud, duress, imposition, or other like cause. In one of Cowen & Hill's Notes to Phillipps on Evidence (see note 481, p. 257), it seems to be insisted that the declarations of a devisor are admissible against the devisee upon the same principle with those of an ancestor against the heir, or of a grantor against his grantee. Perhaps they may be, where the declaration is in regard to the estate; but where it has reference to the validity

of the will, the case is entirely different. Declarations of an ancestor, grantor, etc., are admitted, because they are against the interest of the party making them, and might, when made, have been used against him. But these reasons do not apply at all to the declarations of a testator in regard to his will. He has no *interest* in the matter, and the declarations could never, under any circumstances, be used against him personally. The distinction is obvious and material. There are one or two cases in the reports of the State of North Carolina which might seem to hold a contrary doctrine to that here advanced, viz.: Reel v. Reel (1 Hawks 248), and Howell v. Barden (3 Dev. 462). But the *decision* in the first of these cases is entirely reconcilable with the view here taken, although all that is said by the court may not be.

I have referred thus particularly to these numerous cases, in which the declarations of testators have been held *inadmissible* upon contests respecting the validity of their wills, for the purpose of showing that they all apply to one or the other of the first two of the three classes into which I have divided the cases on the subject. None of them have any application to cases in which the will is assailed on account of the insanity, or mental incapacity of the testator at the time the will was executed, or on the ground that the will was obtained by undue influence.

The difference is certainly very obvious between receiving the declarations of a testator, to prove a distinct external fact, such as duress or fraud for instance, and as evidence merely of the mental condition of the testator. In the former case it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject; while in the latter it is the most direct and appropriate species of evidence. Questions of mental competency and of undue influence belong in this respect to the same class: because, as is said by Jarman, in his work on wills, "The amount of undue influence which will be sufficient to invalidate a will, must of course vary with the strength or weakness of the mind of the testator." (1 Jarman on Wills, 36.) So the mental strength and condition of the testator is directly in issue in every case of alleged undue influence; and the same evidence is admissible in every such case, as in cases where insanity or absolute incompetency is alleged. It is abundantly settled that upon either of these questions, the declarations of the testator, made *at or be-*

fore the time of the execution of the will, are competent evidence. The only doubt which exists on the subject is, whether declarations made *subsequent* thereto may also be received.

Clear and accurate writers have been led into confusion on this subject, by not attending to the distinctions growing out of the different purposes for which the evidence may be offered. Mr. Greenleaf, in his work on evidence, in treating of the invalidity of wills, in consequence of the insanity, or mental imbecility of the testator, says: "In the proof of insanity, though the evidence must *relate to* the time of the act in question, yet evidence of insanity immediately before or *after* the time is admissible. Suicide committed by the testator soon after making his will, is admissible as evidence of insanity, but it is not conclusive." And in the same section he adds: "*The declarations of the testator himself* are admissible only when they were made so near the time of the execution of the will as to become a part of the *res gestae*," and he refers for the last proposition to Smith v. Fenner, *supra*. (See 2 Greenl. Ev., sec. 690.) Nothing could be more incongruous than the different branches of this section. To say that the *insanity* of the testator, subsequent to the making of the will, may be proved, but that the declarations of the testator are inadmissible for the purpose of proving it, is not a little extraordinary. It admits the fact, but excludes the most common and appropriate evidence to establish it.

This incongruity, and the citation of the case of Smith v. Fenner, where the declarations were offered not to prove insanity or mental imbecility, but fraud and circumvention, shows that the attention of the learned author was not directed to the distinction I have alluded to. The first position advanced by Mr. Greenleaf in this passage, viz.: that the insanity or incapacity of the testator *after* the execution of the will may be proved, not as important in itself, but as a means of arriving at his condition when the will was executed, seems to be sustained by authority. (Dickinson v. Barber, 9 Mass. 225; Grant v. Thompson, 4 Conn. R. 203; Irish v. Smith, 8 Serg. and Rawle 573.) But the latter, that this cannot be established by the conversation or declarations of the testator himself, is in conflict with numerous cases. In Stevens v. Vancleve (4 Wash. C. C. R. 262), the question arose, and WASHINGTON, J., said: "The only point of time to be looked at by the

jury, at which the capacity of the testator is to be tested, is that, *when the will was executed.* He may have been incapable to make a will at any time before or after that period, and the law permits evidence of such prior and subsequent incapacity to be given. But unless it *bear upon* that period, and is of such a nature as to show incompetency when the will was executed, it amounts to nothing." In Rambler v. Tryon (7 Serg. & Rawle 90), upon a question of mental imbecility, the plaintiff was permitted to prove that the testator, in the absence of his wife, to whom he had devised his property, "told the witness that his father-in-law and wife plagued him to go to Lebanon: that they wanted him to give her all, or he would have no rest, and that he did not wish to go to Lebanon." The court held this proof admissible as evidence of weakness of mind, operated upon by excessive and undue importunity. It does not distinctly appear from the report of this case, whether the declaration was prior or subsequent to the making of the will; but in the subsequent case of McTaggart v. Thompson (14 Pennsyl. R. 149), it is distinctly asserted by the court that the declaration was *after* the execution of the will. ROGERS, J., says: "It is expressly ruled in Rambler v. Tryon (7 Serg. & Rawle 90), that the declarations of the testator, *although after* the execution of the will, are evidence of imbecility of mind."

The offer in the case of McTaggart v. Thompson was, to prove declarations of the testator *after* the execution of the will as to the disposition of his property, "that he had ruined his family, and that he had been deceived and imposed upon by persons who procured him to make his will." The court held the evidence inadmissible. The case of Reel v. Reel (1 Hawks 247) is a leading case on this subject, and one which has been supposed to conflict, and was supposed by the court which decided it to conflict with several of the cases I have cited, especially Jackson v. Kniffen (2 John. 31) and Smith v. Fenner (1 Gallis. 170); but which, when viewed in the light of the arrangement of the cases which is here adopted, will be seen to be in entire harmony with them. The offer in Reel v. Reel was to prove repeated declarations of the testator, made *after* the execution of the will, in which he stated its contents to be materially and utterly different from what they were. These declarations were offered in connection with conflicting testimony upon the point of testamentary capacity. The

evidence here offered bore exclusively upon the question of the competency of the testator: and of course did not fall within the principle of those cases, which exclude declarations bearing upon questions of fraud, duress, etc., unless a part of the *res gestae.* Hence there was no necessity, as the court seemed to suppose, for overruling the cases of Jackson v. Kniffen and Smith v. Fenner, in order to admit the evidence offered in this case. The decision of the court in holding the evidence admissible, is not in conflict, so far as I have been able to discover, with any adjudged case, either in this country or in England, and on the other hand is in entire harmony with what seems to be the established doctrine, that the insanity or imbecility of the testator subsequent to making the will may be proved, in connection with other evidence, with a view to its reflex influence upon the question of his condition at the time of executing the will. Indeed, if the latter doctrine is sound it necessarily follows that the decision is right.

This conclusion is of course decisive of the present case, which is identical in principle with that of Reel v. Reel. Here, as in that case, the offer was to prove declarations of the testator, stating the contents of the will to be entirely different from what they were in fact: and these declarations were offered in connection with other evidence bearing upon the competency of the testator at and before the execution of the will. If evidence of the mental condition of the testator *after* the execution of the will is admissible in any case, as to his capacity when the will was executed, and the competency of such proof seems to be sustained by many authorities and contradicted by none; then it is clear that the testimony offered here should have been admitted.

It does not follow from this that evidence of this nature is necessarily to be received, however remote it may be in point of time from the execution of the will. The object of the evidence is to show the mental state of the testator at the time when the will was executed. Of course, therefore, it is admissible only where it has a legitimate bearing upon that question: and of this the court must judge, as in every other case, where the relevancy of testimony is denied. If the Judge can see that the evidence offered cannot justly be supposed to reflect any light upon the mental condition of the testator, at the time of making the will, he has an undoubted right to exclude it. In the present case it was

impossible for the Judge to say this in advance of any information as to the precise period when, and the circumstances under which the declarations proposed to be proved were made.

There is no conflict between the doctrine here advanced in regard to the admissibility of the species of evidence in question and the rule before adverted to, which excludes it when the issue is as to the revocation of a will. The difference between the two cases consists in the different nature of the inquiries involved. One relates to a voluntary and conscious act of the mind; the other to its involuntary state or condition. To receive evidence of subsequent declarations in the former case would be attended with all the dangers which could grow out of changes of purpose, or of external motives operating upon an intelligent mind. No such dangers would attend the evidence upon inquiries in relation to the sanity or capacity of the testator.

It is unnecessary to notice the other points in the case. It may, however, be proper to say that the testimony offered and rejected, in regard to the two thousand acres of land in Florida, was wholly immaterial, as it would not, if given, have been in the least inconsistent with the will, which in terms admitted that the land had formerly belonged to William.

The judgment of the Supreme Court must be reversed, and there must be a new trial of the issues.

Denio, *Johnson*, *Parker*, *Allen*, and *Edwards*, JJ., concurred.

Gardiner, C. J., dissented.

Judgment of the Supreme Court reversed and new trial ordered.

TESTIMONY CONCERNING SANITY.

In considering the subject of evidence concerning the sanity of the testator, it must be noticed that the topic is one on which different courts would be likely to lay down different rules concerning the competency of the witnesses and the proper scope of their testimony. Such variance does, in fact, exist in some points. We will here point out the generally accepted and leading rules, and call attention to the marked exceptions. In doing so it will be convenient to classify witnesses in three groups, namely: first, the subscribing witnesses; second, experts; and third, other witnesses.

1. So far as subscribing witnesses go, then, it is customary to

allow them a good deal of leeway. One of the very purposes of requiring witnesses at all is to provide for testimony from competent persons on the question, among others, of the testator's general capacity to make a will. Their position, too, in having been present at the execution, and having their attention called, with more or less directness, to the fact that testator was doing some act calling for the exercise of some degree of judgment, and in having themselves subscribed their names on the same paper signed by him, is such as to render their testimony of unusual importance.[1] They may therefore testify whether, in their opinion, testator was, at the time of executing the will, sane or insane.[2] If required, they must, however, state the facts on which that opinion is based.[3] And their testimony is not conclusive.[4]

2. Much scope is also allowed in the testimony of a competent expert, made familiar by experience and training with the field to which his testimony relates. On the basis of the facts testified to by other witnesses, or of facts observed by himself in the particular instance, he may state his opinion of the sanity of the testator,[5] and should state the particular facts and grounds on which he bases it.[6]

3. Other witnesses, non-professional and non-subscribing, are in general allowed to give their opinion, derived from personal observation, of testator's sanity.[7] But they must state the facts observed by them, on which they base the opinions given,[8] and their opportunities for observation will greatly affect the weight of their testimony.[9]

In some States, however, these non-expert, non-attesting wit-

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[1] Hastings v. Rider, 99 Mass. 622.

[2] Clapp v. Fullerton, 34 N. Y. 190; Robinson v. Adams, 62 Me. 369 (409).

[3] Robinson v. Adams, 62 Me. 369 (409). [4] Schouler on Wills, § 178.

[5] Heald v. Thing, 45 Me. 392; Kempsey v. McGinness, 21 Mich. 128.

[6] Kempsey v. McGinniss, 21 Mich. 123; Gibson v. Gibson, 9 Yerg. 329; Keith v. Lothrop, 10 Cush. 453; Heald v. Thing, 45 Me. 392; Clark v. State, 12 Ohio 483.

[7] Beaubien v. Cicotte, 12 Mich. 459 (501); Weems v. Weems, 19 Md. 334; Stubbs v. Houston, 33 Ala. 555; Cram v. Cram, 33 Vt. 15; Hardy v. Merrill, 56 N. H. 227; *In re* Will of Norman (Ia.), 33 N. W. Rep. 374.

[8] Appleby v. Brock, 76 Mo. 314; Turner v. Cheesman, 15 N. J. Eq. 243; Dunham's Appeal, 27 Conn. 192; Staser v. Hogan, 120 Ind. 207.

[9] Weems v. Weems, 19 Ala. 334.

nesses are allowed to testify merely to the facts observed by them bearing on the question of testator's sanity at the time in question, leaving the jury to deduce from the facts so stated, aided by the opinions of experts and of the subscribing witnesses, their own opinion on the subject in question.[1] The distinction, however, between facts, and opinions derived therefrom, is often exceedingly fine-spun. Thus it was held, in Nash v. Hunt,[2] that testimony that witness noticed "no incoherence of thought," and nothing "unusual or singular" in testator's mental condition, was held to relate to a fact and not an opinion. And in New York, non-expert, non-subscribing witnesses may testify to acts and declarations of testator observed by them, and may characterize them as "rational" or "irrational," and give the impression produced thereby on their own minds. But they are not allowed to state their opinion of testator's sanity or insanity.[3]

In all the foregoing classes of cases, the opinions of witnesses, where admissible, are to be tested by the facts on which the witness bases them, and which are stated in his testimony, and their weight will depend both on the nature of the facts and the opportunities enjoyed by the witness for forming a comprehensive and accurate opinion. But, nevertheless, the opinions themselves, in connection with the facts and circumstances, are also entitled to weight on their own account. Otherwise, there would be no object in admitting them.

Note.

For a general review of the subject of insanity in its relation to testamentary capacity, the following works may be consulted:

Ray's Medical Jurisprudence of Insanity; 2 Taylor's Principles of Medical Jurisprudence, ch. 88–99; Dr. Wm. A. Hammond's "Insanity in its Medico-Legal Relations"; 1 Wharton & Stillé's

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[1] Hastings v. Rider, 99 Mass. 622. Such was the decision in Boardman v. Woodman, 47 N. H. 120, now abandoned in Hardy v. Merrill, 56 N. H. 227. For an exhaustive review of the decisions on both sides of this question, see dissenting opinion of Doe, J., in State v. Pike, 51 N. H. 105. See also Gehrke v. State, 13 Tex. 568.

[2] 116 Mass. 237. Also see May v. Bradlee, 127 Mass 414.

[3] Rider v. Miller, 86 N. Y. 507; Clapp v. Fullerton, 34 N. Y. 190.

Medical Jurisprudence, Bk. I., ch. 2; Bk. II.; Maudsley's Physiology and Pathology of the Mind; Buswell on Insanity, Ch. I. and Ch. XI.; Browne's Medical Jurisprudence of Insanity; Elwell's Medical Jurisprudence, Chs. XXIV.–XXXI; Esquirol's Illusions of the Insane. And on the testimony of Experts, also Ordronaux's Jurisprudence of Insanity.

CHAPTER II.

UNDUE INFLUENCE.—FRAUD.

We have again and again reiterated the principle that what the law seeks to find and enforce is the real and duly authenticated wish or will of the testator himself. Therefore, if it can be shown that the instrument propounded embodies not his will, but that of somebody else, then, of course, it cannot be enforced. The trouble with it may be that there was actual fraud, as, for example, in reading one instrument to the testator and then surreptitiously substituting another for him to sign;[1] or it may be that the testator was badgered or crowded or actually coerced into making a will not representing his own personal wishes. In such cases the instrument is not the will of the testator, and has no claim whatever for consideration at the hands of the law. But influence over testator's mind, in order to vitiate the will, must be "undue," —that is, it must go beyond reasonable argument, suggestion, request, advice, persuasion, or the urging of claims to special recognition.[2] The true test of "undue" influence is that it *overpowers the will without convincing the judgment.*[3]

It is obvious that undue influence is more likely to be found, or perhaps is only to be found, where the testator is feeble, and ready to yield for the sake of peace, or is somewhat weak in mind or body, or in some way not fully fitted, or in a position, to stand up for his own rights; and so also in regard to fraud,—it is more easily perpetrated where testator is blind, or deaf, or otherwise disabled. In all such cases, therefore, special care is required to make sure that the instrument does embody the testator's own will.[4]

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[1] Doe dem. Small v. Allen, 8 T. R. 147 (given *post*).

[2] Dale's Appeal, 57 Conn. 127; Kerr v. Lunsford, 21 W. Va. 659; Stoutenburgh v. Hopkins, 43 N. J. Eq. 577; Earle v. Norfolk, 36 N. J. Eq. 92; Eastis v. Montgomery (Ala.), 9 So. Rep. 311; Tallman's Will (Penn.), 23 Atl. R. 986; Hess' Will (Minn.), 51 N. W. Rep. 614.

[3] Hall v. Hall, L. R. 1 P. & D. 581, given *post;* Severance v. Severance (Mich.), 52 N. W. 292; Schmidt v. Schmidt (Minn.), 50 N. W. 598.

[4] Griffith v. Diffenderffer, 50 Md. 466 (481); Reichenbach v. Ruddach, 127 Penn. St. 564.

UNDUE INFLUENCE.—BURDEN OF PROOF.

As already stated, the burden of making out a charge of undue influence rests on the party setting it up.[1] If he relies on it he must prove it by a preponderance of evidence.[2] Mere suspicions will not answer.[3]

The question of whether the contestant in any given case has offered sufficient evidence of undue influence to tip the balance against the will, depends on all the facts of the particular case itself, and few rules of general application can be laid down. There are some points, however, to which attention should be called, namely:

1. In transactions *inter vivos*, the mere fact that the parties stand in some fiduciary relation toward one another, as that of guardian and ward, confessor and confessed, attorney and client, or physician and patient, may be in itself sufficient to raise a presumption of undue influence, and call upon the confessor, attorney, or guardian to show the absence thereof.[4] In the case of wills, however, proof of the mere fact that the beneficiary was the trustee, confessor, physician, attorney, or guardian of the testator, or occupied any fiduciary relation toward him, though often a suspicious circumstance, does not of itself raise a presumption of undue influence.[5]

2. But if it be shown that the guardian, or other person occupying the fiduciary position, made active personal efforts to procure

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[1] Tyler v. Gardiner, 35 N. Y. 559.

[2] Seebrock v. Fedawa, 46 N. W. Rep. 650.

[3] Parfitt v. Lawless, L. R. 2 P. & D. 462.

[4] Nesbit v. Lockman, 34 N. Y. 167. The person propounding the alleged last will of a testatrix was the chairman of the board of guardians of the union in whose workhouse infirmary the testatrix was an inmate at the time the alleged will was made, and in which she died. The plaintiff obtained from a solicitor a form of will, and filled it up in pencil. He refused to allow the solicitor to go to the deceased. Having got the will, the plaintiff called in a friend of his own, and with him went to the infirmary, and the testatrix put her mark to the will in their presence and that of a nurse. The jury found that a plea of undue influence was established. Parker v. Duncan, 62 L. T. (N. S.) 642. (Such is the statement of the headnote in the report. The jury in fact found also, however, that testatrix was not of sound mind, and that she did not know the contents of the alleged will.)

[5] Parfitt v. Lawless, L. R. 2 P. & D. 462; Bancroft v. Otis, 8 So. Rep. 286 giving a very full discussion of the subject).

the will in his own favor, then it devolves on him to prove that nevertheless the will was the free act of the testator.[1]

3. The mere fact that the beneficiary drew the will, even though testator's attorney, does not necessarily and always raise a presumption of undue influence,[2] though the circumstance is more or less suspicious, according to the facts of the particular case.[3] And all the facts may, when taken in conjunction with it, create so strong a suspicion as to raise a presumption of undue influence.[4]

4. Bequests to persons in confidential relations not fiduciary in the ordinary sense, as, for instance, that of parent and child, master and servant, etc., do not in themselves raise any presumption of undue influence, not even where the beneficiary did take active steps to procure the will. In such cases further proof that the influence was undue must be offered.[5] But if such a beneficiary had the testator in his power, and testator was feeble, or other suspicious circumstances are shown, then the confidential relation may contribute to raise a presumption of undue influence, especially where the provisions of the will are unnatural.[6]

5. Illicit relations between testator and beneficiary, when coupled with other circumstances, indicating either actual constraint; impaired testamentary capacity; loss of will power; habits of intemperance; sickness or disease at the time of making the will, contribute to raise a presumption of undue influence. But taken merely by themselves, they raise no such presumption.[7]

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[1] Dale's Appeal, 57 Conn. 127; Parker v. Duncan, 62 L. T. (N. S.) 642.

[2] Post v. Mason, 91 N. Y. 539; Barry v. Butlin, 1 Curt. 637; Loder v. Whelpley, 111 N. Y. 239 (250); Sheldon's Will, 16 N. Y. Supp. 454.

[3] Barry v. Butlin, 1 Curt. 637.

[4] Matter of Will of Smith, 95 N. Y. 516; Tyler v. Gardiner, 35 N. Y. 559.

[5] Fritz v. Turner, 46 N. J. Eq. 515. See Jones v. Robertson, 37 Mo. App. 163.

[6] Dale v. Dale, 38 N. J. Eq. 274; Carroll v. House, 22 Atl. Rep. 191; Lyons v. Campbell, 88 Ala. 462; Tyler v. Gardiner, 35 N. Y. 559; Roberts v. Trawick, 13 Ala. 78; Matter of Westurn, 60 Hun 298; Cowee v. Cornell, 75 N Y. 91 (99).

[7] Heilbrun's Estate, 9 Penn. Co. Ct. R. 350; Wallace v. Harris, 32 Mich. 393-4.

FRAUD.—SURREPTITIOUS SUBSTITUTION.

Doe on the demise of Small and others against Allen.

COURT OF KING'S BENCH, 1799.

(8 T. R. 147.)

Suit in ejectment involving title to certain premises in Shropshire. Testator had executed one will March 5, 1762, and a second March 20, 1762. The suit turned on the question which of these was the valid last will. At the trial before THOMPSON, Baron, at the assizes for the County of *Salop* the due execution of the will of the 20th of *March*, 1762, being proved, the defendant, who wished to set up the will of the 5th of *March* preceding, offered to call a witness to prove that she was in the room when the testator executed the will of the 20th of *March*, and that at the time of the execution the testator inquired *whether it was the same as the former;* and was told that it *was*. This evidence was objected to and the objection allowed, and there was a verdict for the plaintiff, with liberty to the defendant to move for a new trial in case the evidence ought to have been received. A rule to show cause was accordingly obtained.

Lord *Kenyon*, Ch. J.—I think that this evidence ought to have been received. The testator having made one will, which (is admitted) was a good will, and being pressed by certain persons around him to make another will, asked in the presence of credible witnesses whether or not the second will, which was brought to him to be executed, were the same as the first, which was answered in the affirmative. It turns out that it was different from the first will, and the question here is whether or not that evidence ought to be received. Our decision will not in the least tend to repeal the Statute of Frauds, or contradict the case of Selwin v. Browne.[1] I agree that the contents of a will are not to be explained by parol evidence; but, notwithstanding that act, evidence may be given to shew that a will was obtained by fraud. And the effect of the evidence offered in this case was to shew that one paper was obtruded on the testator for another which he intended to execute.

[The report gives a brief opinion to the same effect by *Grose*, J.; and *Lawrence*, J., also concurred.]

Rule absolute.

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[1] Cas. temp Talbot, 240; 4 Bro. P. C. 179 (186).

CONSTRAINT.—SICK AND FEEBLE TESTATOR.

Hacker v. Newborn, a Sussex Cause.

BANC. SUP., 1654.

(Styles, 427.)

If a Man make his Will in his Sickness, by the over-importuning of his Wife, to the end he may be quiet, this shall be said to be a Will made by constraint, and shall not be a good Will. By *Rolle* chief justice, In a Tryal at the Bar in the Case of one Hecker and Newborn, Mich. 1654.

UNDUE INFLUENCE.—GENERAL PRINCIPLES.—INFLUENCE OF WIFE.

Hall v. Hall.

ENGLISH COURT OF PROBATE, 1868.

(L. R. 1 P. & D. 481.)

This was a testamentary suit in which the plaintiff, Ann Hall, propounded the will of her deceased husband, John Hall. The defendant, William Hall, the brother of the deceased, pleaded that the will was obtained by the undue influence of the plaintiff. Issue was joined on this plea, and the cause was tried on the 6th and 7th of March, 1868, before Sir J. P. Wilde, by a special jury. The deceased was a farmer and land valuer near Nottingham, and by the will in question he left the whole of his property, of the value of between £15,000 and £20,000, to his wife.

Sir *J. P. Wilde*, in summing up, gave the following direction to the jury on the question of undue influence: To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to

resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's.

His Lordship went on to say that in this case the question was one of credibility, for, according to the evidence on the one side, the plaintiff had procured the will by violence, threats, and intimidation, whilst, according to the evidence of the plaintiff and her witnesses, she had not even resorted to persuasion.

The jury found that the plea of undue influence was proved.

The Court pronounced against the will and condemned the plaintiff in costs.

UNDUE INFLUENCE.—SUSPICIOUS CIRCUMSTANCES.

In re Bernsee's Will.[1]

NEW YORK SUPREME COURT, 1892.

(17 N. Y. Supp. 669.)

Appeal from decree of Surrogate of Kings County, admitting to probate a paper purporting to be the will of Adelina D. Bernsee, deceased. Two questions were raised on the appeal: first, whether due execution was sufficiently proved, and second, whether the will was framed by undue influence.

Pratt, J. (After finding that due execution had not been proved). 2. Was the will framed by undue influence? While this fact is to be proved, not presumed, the undisputed facts tend strongly to the conclusion that such was the case. A prior will which divided the property equally between the children of testatrix, two sons and two daughters; uninterrupted affectionate relations between testatrix and at least one of the daughters; her residence with the sons at the time of the making of the will; her refusal, or, at least, neglect, to see either daughter after she took

[1] It will be noticed that this is a recent decision of the Supreme Court, and may yet be passed on by the Court of Appeals. The facts as here stated are, however, certainly evidence competent on the question of undue influence.

up her residence with the sons; the refusal of the daughters to recognize the alleged wife of one of the sons, as not married to him; the declaration in the will of unfilial conduct of the daughters, against the uncontradicted proof; the failure to call the draughtsman of the will; the presence of the son at the time of the execution, when, if Mr. Black is to be believed, he had nothing to do, and did nothing; her nervous and very excited condition at the time, which is not disputed; her entire disinheritance of her daughters, and the giving of her entire estate to her sons, with whom she lived,—all, unexplained, tend powerfully to show undue influence. These circumstances called strongly upon the surrogate for the exercise of his discretion in calling for the draughtsman of the will to ascertain who prompted it, and the conditions surrounding its preparation. Upon the facts, therefore, the judgment should be reversed. There were several rulings of the surrogate, in the rejection and striking out of testimony, which appear to have been erroneous, but which it is unnecessary to consider.

Dykman, J., concurring. *Barnard*, P. J., dissenting.

UNDUE INFLUENCE.—GENERAL PRINCIPLES.—PERSUASION.

Earl of Sefton and Another v. Hopwood.

NISI PRIUS, NORTHERN CIRCUIT, 1855.

(1 F. & F. 578.)

This was an issue directed by the Court of Chancery to ascertain whether certain documents dated the 12th of April, and the 14th of May, 1853, were respectively the codicil and will of Robert Gregge Hopwood. One of the questions raised was that of undue influence.

It appeared that Mr. Hopwood was the owner of an ancient family estate called Hopwood Hall, and of other freehold property, including a colliery, named Hopwood Colliery, and that at the times of making his codicil and his will, and of his death, he had an eldest son, the defendant, who was married and had a son and four daughters, and he had also two other sons and a daughter.

By the codicil Lord Sefton was appointed executor, and by the will, which, like the codicil, was drawn and witnessed by the family solicitor, Mr. Hopwood revoked former testamentary dispositions,

in order, as alleged, to mark his indignation against the defendant, and cut him off entirely.

The evidence on the point of undue influence by defendant's brothers against him was conflicting.

Cresswell, J., directed the jury as to the law, thus—(after stating the rule of testamentary capacity and the right of a competent testator to dispose of his property as he pleases):

I had supposed, during a great portion of this trial, that would be the sole question you would have to deal with, but towards the close of the Attorney-General's address, I apprehend that he meant to raise another question with which I shall therefore think it necessary to trouble you, namely, the question of whether, assuming Mr. Hopwood had capacity to dispose of his property, this was his will or not. The subject of wills procured by influence has been a good deal discussed of late years, and I think that the law, as at present understood, has somewhat modified the earlier opinions on the subject. I take it, that in order to invalidate a will on the score of influence, it is not sufficient that you should think the testator has been persuaded into making a will of a particular kind, that he has been persuaded to benefit this or that person to a certain extent, for in that case I fear that a vast number, if not the greater proportion, might be set aside, and what is the sort of influence that is to set aside a will? Is it the influence exercised by acts of attention and kindness? Is it the influence acquired by showing devoted affection? Certainly not. And yet how many wills are made under the influence of feelings so excited. It must be an influence depriving the party of the exercise of his judgment and his free action; it must be such an influence as induces you to think that the will, when executed, is not the will he desires to execute, that he does not benefit the parties whom he would wish to benefit, but that he is doing that which is not his desire, and therefore not his will.

Verdict for the defendant.

UNDUE INFLUENCE.

Bush v. Lisle.

KENTUCKY COURT OF APPEALS, 1889.

(89 Ky. 393.)

Lewis, C. J.—This is an appeal from a judgment rendered on verdict of the jury finding a paper dated October 30, 1876, and probated in the county court, not to be the true last will and testament of F. M. Lisle, who died in February, 1879, at about the age of 58 years, without wife or child. He left no parents, his mother having died before he did, though subsequent to date of the paper, those who would have inherited his estate in case of no will, being one brother, three sisters, and children of each of four sisters who were dead. But he devised, or attempted to devise, the whole of his estate, of value about $20,000, consisting of choses in action, money, and land, to his sister Minerva Bush, her four daughters, and husband, Robert E. Bush; there being given to the last named, who was appointed executor, five shares of bank stock, to each of the four nieces specified land and money, and to the sister the residue. The grounds upon which the other heirs at law assail the validity of the paper as a will are want of testamentary capacity and undue influence. It appears that previous to 1866 the decedent had been a professional gambler, but as the effect of syphilis contracted many years previously, from which he never recovered, and probably of excess and dissipation, he became a wreck physically, losing his hair, teeth, eyesight partially, and use of his lower limbs to such an extent as to make crutches necessary for locomotion; and in that condition he went to the residence of a double cousin in Fayette County, Rufus Lisle, with whom he stayed until 1867 or 1868, when he removed to the house of Robert E. Bush, in Clark County, where he remained until his death; a room adjoining the dwelling-house having been constructed at his own instance and expense for him to occupy. Within a year or two after going to the house of his brother-in-law he became totally blind, unable to walk, and from his mouth, which was drawn out of its natural shape, offensive matter escaped. So he thereafter required and received from those to whom he attempted to give his estate the most assiduous, careful, and affectionate nursing and attention. He had, before going there, as re-

lief from his intense suffering in his lower limbs, contracted and continued to his death, the habit of using morphine, a comparatively large quantity of which he daily consumed. It further appears that during paroxysms of physical pain he was excessively and offensively profane and blasphemous; and from these two habits, both mental incapacity to make a will and undue influence are sought to be deduced as existing facts. There is no evidence whatever of unreasonable prejudice on his part towards any of the contestants, nor that he was swayed or prompted to abandon any fixed purpose, or to ignore any worthy or recognized claim on his bounty. On the contrary, ten years before the date of the paper, when his situation was less deplorable than it afterwards became, and when there is no evidence that he was not entirely rational, he offered to give his whole estate to his cousin, Rufus Lisle, to secure a home and needful care and attention while he lived, and the disposition he finally made of it was consistent, natural, and commendable, because intended as a grateful recompense, no more probably than adequate, to those who did minister to him in affliction. The person who wrote the paper testifies that besides himself no one was present; that the decedent was in full possession of his mental faculties, and, without aid or suggestion, dictated the paper as written; and the provisions of it show not only a preconceived and fixed plan for disposing of his estate, and full knowledge of the character and value of it, and the persons to whom it was left, but unusual intelligence of the legal restraints and limitations put upon the devises to his nieces.

Of the very large number of witnesses who testified on the trial but three express any doubt of capacity of the decedent to make a will. One of them, who is a contestant, stated as his opinion that he did not think a man could be a sane man who used blasphemous language towards Jesus Christ. Another, who visited him as a physician once or twice, expressed the opinion that he did not think a person who used morphine and whiskey as decedent did was capable of taking into consideration his property and relations, and making a fair, just, and equitable disposition of his property, though he does not undertake to say what quantity of either he was in the habit of using, nor what his mental condition actually was when the paper was written, nor when it was, two days afterwards, signed and acknowledged. And the third, who

once saw him while in a paroxysm of pain, testified his professional opinion to be that no man who had been an invalid for a number of years, and under influence of morphine for such a length of time, is competent to transact business. But neither one of those three witnesses, nor any one else throughout the entire trial, testifies to a single irrational act or speech by the decedent, or even profane language when he was not, for a time, racked with pain, with the single exception of J. B. Lisle, the principal contestant, who refers to one trivial remark about which it was shown by another witness he evidently misunderstood the decedent. On the contrary, those acquainted with him testified he possessed a clear, vigorous intellect and strong will, which continued, when he was not in a sleepy state from use of morphine, up to his death; and it clearly and fully appears that from the time he went to the house of Robert E. Bush to the date of the paper, and even afterwards, he transacted business, loaning money, buying land, keeping account of interest and dividends on stock due him, was consulted by his friends about business matters, discussed politics, banking, and neighborhood affairs with perfect intelligence, and kept full control of his estate, so that when he died there had not been any of his income wasted or disposed of at all, except with his consent and full knowledge.

It seems to us, as the record stands, there is a total failure by the contestants to show lack of mental capacity on the part of the decedent to make a will; and, in our opinion, evidence of undue influence by the devisees, or of any other person, is equally unsatisfactory, and the verdict of the jury can be accounted for only on the supposition that their attention was diverted from facts proved, to abstract theories of physicians who never examined nor had knowledge of the actual mental condition of decedent when the paper was executed. It is needless to refer in detail to the testimony of the learned experts, because there was such an agreement in their statements as to make reference to the evidence of one suffice for all. The general conclusion drawn from the hypothetical case assumed by them is that the brain of a person in the condition the decedent was shown to be in, if confined in the same family eight or nine years, taking morphine habitually three or four times per day, administered by members of that family, would have no capacity to make a will or do anything which he

believed would be contrary to the wishes of such family, and would seek by every means to please them, although he at the same time might talk intelligently, and impress an ordinary observer as being exceedingly bright. It seems, however, to be conceded by the experts that the use of morphine does not necessarily impair the intellectual faculties, and consequently their evidence, if pertinent in this case at all, has relation alone to the question of undue influence. Expert testimony is worse than useless, it is misleading when given on a subject about which there is proof so convincing as to leave no reasonable ground for dispute, or when variant from the actual state or condition shown by positive evidence to exist, and no conclusion reached by a mere theorist, however learned, can be reasonably accepted and applied in any case without being founded on and consistent with the facts as they are proved to be. If there had been doubt or contrariety of evidence in regard to the real state of the decedent's intellectual faculties, it might have been pertinent to show by experts what are the usual consequences of physical infirmities and habits such as his. But it does not appear that his mind was impaired or affected by the disease he was afflicted with, nor that he was dependent upon Robert E. Bush or any of his family for morphine, nor was their aid in procuring it, or permission to use it, ever sought by him. On the contrary, he had an estate sufficient to gratify every wish and supply every want, the character and value of which he well knew, and the management and control of which he kept without dispute or question till his death, and the morphine used by him was purchased with his own means and at his own pleasure, without hindrance or protest from any one. And, whatever may be the ordinary effect of use of morphine, the evidence in this case does not show any weakening of the will power of the decedent, nor the slightest effort on the part of any one of his devisees or other person to influence or control, by coercion, argument, or persuasion, the final disposition of his estate, nor that he was influenced to dispose of it as he did by any other reason, motive, or feeling than gratitude to and affection for Mrs. Bush, who was his favorite sister, as shown by two previous wills, in one of which he gave his estate to her and a brother since dead, and in the other the bulk of it to her, and by the significant fact

that, when he became a helpless and doomed invalid, he selected her, of all others, to nurse and care for him.

There is some evidence tending to show her anxiety about the manner in which he would dispose of his property, but none that she or any one else attempted to influence him in regard thereto by importunity, persuasion, or even suggestion. In two instances she interfered to prevent gifts by him to other persons, one of them being a drunken man, and the other a lewd woman, his former mistress, to whom he had previously given money, and who was endeavoring to obtain more. It also appears that he was unwilling for his sister to leave him, and some of the witnesses quote her as saying he displayed weakness by shedding tears when she did go away from home, leaving him to the care of others. But there is no evidence showing, or from which it can reasonably be inferred, that any of the devisees acquired such dominion or influence over him as deprived him of the power to dispose of his estate in accordance with his own wishes; and in view of the claims of other relations, and without the existence and actual exercise of such dominion, as has often been held by this court, he must be regarded as executing the will without undue influence; for neither mere appeals to the affections, nor arguments addressed to the understanding, even when effective, amount to undue influence, in the meaning of the law. There was, however, according to the evidence, no other influence exerted or appeal made by the devisees than such as affectionate care and attention offered, which the law upholds rather than condemns. In our opinion, the evidence in this case shows clearly that F. M. Lisle had testamentary capacity, and freely and without undue influence executed the paper in contest, and it should be held his true last will and testament. Wherefore the judgment must be reversed, and, as the verdict is not sustained by the evidence, the cause is remanded, with directions to the lower court to dismiss the appeal from the order of the county court, probating and admitting to record the paper as his will.

UNDUE INFLUENCE.

Matter of Will of Budlong.

NEW YORK COURT OF APPEALS, 1891.

(126 N. Y. 423.)

O'Brien, J.—Milton Budlong died on the 20th day of April, 1880, having made a will on the 4th of January previous, in which he disposed of his real and personal estate, amounting to considerably over $50,000. The validity of this will was the sole question involved in these proceedings. He left a widow, three sons, and three daughters surviving, who were the natural objects of his bounty in the distribution of his estate. The will provided for the comfortable support of the widow, according to her station in life, which support was in lieu of dower, and made a charge upon the real estate. To one of the daughters he devised two houses and lots in the village of Fairport; to another he gave a money legacy of $5,000. He gave the residue of his real and personal estate to two of the sons, in the proportion of one-third to one and two-thirds to the other, the larger share, however, being chargeable with a legacy of $5,000 to the third son, Levi S. Budlong. To the other daughter, Mrs. Louisa J. Cole, who is the contestant of the will, he gave a legacy of five dollars. The three sons were named as executors, and, having petitioned the surrogate of Monroe County to admit the will to probate, the daughter above named filed objections that the instrument was not the will of the deceased; that at the time of its execution he was not capable of making a will, and that the proponents, or some of them, procured its execution by means of deceit, fraud, and undue influence. Upon a trial, in which a large volume of testimony was taken, the surrogate made a decree adjudging the will to be valid and admitting it to probate. While the case was pending before the surrogate, the contestant died, and her heirs at law were substituted in her place. The General Term, upon their appeal, reversed the judgment, and directed a new trial upon two specific issues of fact by a jury. These questions were whether the deceased was of sound mind at the time of executing the instrument, and whether its execution was procured by fraud and undue influence. The new trial resulted in a verdict of the jury, finding that the deceased was of sound mind when the in-

strument was executed, and capable of making a will, but that its execution was procured by undue influence and fraud. The judgment in favor of the contestants entered upon this verdict, has been affirmed by the General Term. [The Court here state the terms and scope of the notice of appeal, and discuss the limits of their power to review; and then proceed.] The only record that is properly before us is that of the trial at the Circuit; and we can review only the judgment entered thereon and subsequent orders and proceedings. The judgment is based upon a finding by the jury that the instrument purporting to be the will of the deceased was not his free and voluntary act, but the result of undue influence and fraud, by means of which his mind was prejudiced against one of his children by one or more of the others, and his natural affection for her perverted. It must be admitted that the jury would have been warranted in taking a contrary view of the facts, but at the same time their finding is not, by any means, so destitute of evidence for its support as to authorize this court to interfere. The deceased was seventy-nine years old when he made the will. His mental and physical powers, which had been remarkably strong and vigorous through life, began to weaken. He was attacked with a severe illness, from which it was supposed by the family he could not recover, and it was during this illness and in expectation of death as the result of it, that the will was executed. The two sons who received the greater part of the estate were with him during his sickness, and one or both of them procured the attorney who drew the instrument. There was some proof of his declarations, made shortly before this illness, that he did not intend to make a will, but to die intestate, to the end that all his children should share equally in his estate under the law of the State. The two sons who were preferred were men of large property in their own right, and up to a time not long before the will was made, the acts and declarations of the father tended to show that all his children were equally dear to him. The claim of the contestants was that the sudden change in the father's affections towards his daughter, which resulted in such an apparently unjust discrimination against her, as appears on the face of the will, was brought about by means of a letter shown and read to him by another daughter, Mrs. Hunt, a short time before the execution of the instrument. This letter was one of the last of a

series of events which were pressed upon the jury as proof that the father's affections had become alienated from his daughter, the contestant, by misrepresentation, resulting in ignoring her in the final distribution of his property. It appeared that some nineteen years before the death of the father, Levi S. Budlong, one of the sons, married a domestic in the family. The father felt humiliated and grieved in consequence of this alliance, threatened to disinherit his son, and refused to be reconciled to him or his wife. After the lapse of some time his attitude towards them softened, and he became more friendly, regarding the marriage as an accomplished fact, and manifesting a disposition to make the best of it. The marriage, however, between the parties themselves proved to be an unhappy one. There is evidence in the case tending to show that the husband ill treated the wife, and that Mrs. Cole, his sister, was a witness to at least one violent assault upon her, and that she on that occasion reproached her brother for such conduct. During the year previous to the execution of the will, Levi went to the State of Iowa, for the purpose of obtaining a divorce from his wife, on the ground of cruel and inhuman treatment. In this controversy the old aversion of the father towards the marriage revived, and his feelings were strongly enlisted on the side of his son and in favor of the divorce. But it appears that the wife resisted the proceedings for divorce, consulted counsel in this State, followed the husband to Iowa, and materially interfered with his plans, if she did not succeed in entirely defeating them. This was a bitter disappointment to Levi, and he attributed his failure to the instigation, assistance, and advice of Mrs. Cole to his wife, or, at least, pretended that she had joined his wife in opposition to him. On the 2d of October, 1879, Levi addressed a long letter from Iowa to his other sister, Mrs. Hunt, who lived near her father. In this letter he took rather a gloomy view of the result of the divorce suit, which appeared to be pending, described the visit of his wife to the West, and its effect upon the suit, and reflected bitterly upon the conduct of Mrs. Cole in assisting and advising his wife, with the result of bringing much trouble and disappointment upon him. He requested the sister, to whom the letter was written, to show it to his father, and she complied with the request. Some proof was given of the statements of the father after he had seen the letter,

tending to show ill feeling toward Mrs. Cole for joining in the contest against her brother, who was described by the father as his favorite son. Proof was submitted to the jury, consisting mostly of circumstances and facts, tending to show that the reflections upon Mrs. Cole, contained in the letter, were substantially, if not wholly without foundation in fact, and that the writer intentionally misrepresented her conduct.

Some proof was also given of declarations made by Levi, tending to show that he had advised his father to make a will, and that if he left Mrs. Cole anything, he would litigate with her as long as he had a dollar to spend in that way. The letter and the other evidence in the case furnished some proof that Levi attempted to, and did, create in the mind of the testator a feeling of prejudice and aversion towards his daughter, with reference to the disposition of his property, which found expression in the will, so far as it relates to her. The court instructed the jury that if Levi wrote the letter, knowing that its statements were untrue, with the design that it should reach his father and influence him in the disposition of his property, and that it did in fact influence him to disinherit Mrs. Cole, then a case of undue influence and fraud was made out. But that if they were not false, and were not designed to, and did not in fact, influence the father in the disposition of his property, then the letter was harmless. Sufficient reference has been made to the evidence to show that the main question in the case, and around which the parties contended, was one of fact that must be regarded as having been put at rest by the verdict of the jury. The counsel for the proponents, by exceptions taken to the charge above referred to, and in the argument in this court, contends that the rule stated by the learned trial judge was erroneous. His position is that as the statements in the letter, whether true or false, and with whatever intent written, related solely to the relations and conduct of Mrs. Cole towards her brother, and in no manner to her feelings, conduct, or relations towards her father, they could have no connection with the will, but related to matters entirely extraneous to it. That at most the statements could not be regarded as anything beyond the complaints of one child against another to the father, without reference to the disposition of property, and, therefore, could not legally affect any will subsequently made. The undue

influence and fraud which the law guards against may be exercised in an almost infinite variety of ways. Prejudice and aversion to a child may be created in the mind of a testator by misrepresentation of the conduct and feelings of this child towards another which, in connection with other facts, such as were shown in this case, may be sufficient to affect the validity of a will in which the child in regard to whom the misrepresentations were made, is ignored in the distribution of the father's estate by will, and this is especially true when no other reason is apparent for a grossly unjust and unequal division among children, with an apparently equal claim upon the testator's bounty. (Tyler v. Gardiner, 35 N. Y. 559; Red. Am. Cases on Wills, note p. 522.) In the course of a very clear and, on the whole, impartial charge, the learned judge who presided at the trial, said to the jury that "if, under all the circumstances of the case, you find that this will was unnatural in its provisions and inconsistent with the duties and obligations of the testator to the different members of his family, it imposes upon the proponents the duty of giving some reasonable explanation of its unnatural character, or at least of showing that it was not the result of mental defect, obliquity, or perversion." The counsel for the proponents excepted to this part of the charge. It must be read in connection with what preceded, in which the court said that though the will might have been grossly unjust in its provisions, yet that fact was of no consequence if it was satisfactory to the party who made it, as every man had the right to dispose of his property according to his own will. That if it was the testator's preconceived design and intention, calmly entered into, to disinherit his daughter, Mrs. Cole, he had a perfect right to do so, and none of us have any right to complain of the exercise of that right, provided in doing so he exercised his own will and was not influenced by the will of another. The fair construction of the portion of the charge excepted to is not that the unequal division of the testator's property, apparent on the face of the will, raised a presumption of undue influence or fraud, which the proponents were called upon to explain; but, if upon all the proof in the case, the jury should find that the will was in fact contrary to the dictates of natural affection, and was, under all the circumstances, unnatural in its dispositions, so far its provisions would be evidence of mental defect, obliquity, or perver-

sion of mind which would require explanation. Thus understood and read in connection with the other propositions, that part of the charge which was the subject of this exception was not objectionable. A learned author on wills has stated the principle in the following language, which we think expresses substantially the same idea as that intended to be conveyed by the charge, if it does not go even farther: "But gross inequality in the dispositions of the instrument, when no reason for it is suggested either in the will, or otherwise, may change the burden and require explanation on the part of those who support the will to induce the belief that it was the free and deliberate act of a rational, self-poised and clearly disposing mind." (1 Redf. on Wills, 557; Redf. Am. Case on Wills, 298, note.) There are numerous other exceptions in the record, but we think they were correctly disposed of in the court below (54 Hun 131), and do not call for any special notice here.

The judgment should be affirmed, with costs payable out of the estate.

All concur.

Judgment affirmed.

UNDUE INFLUENCE.—MEANING OF TERM—BURDEN OF PROOF.

Boyse v. Rossborough.

HOUSE OF LORDS, 1856, 1857.

(6 H. L. C. 2.)

This was an appeal from a decree and orders of the Court of Chancery in Ireland, based on the verdict of a jury, hostile to the paper propounded as the will of Cæsar Colclough. Various questions were involved, and among others the question whether the jury had been properly instructed on the law of undue influence. On this subject the following often-quoted portions are given from the opinion of

THE LORD CHANCELLOR: "The difficulty of deciding such a question arises from the difficulty of defining with distinctness what is undue influence. In a popular sense we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a

companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention, formed without either coercion or fraud.

"I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion, are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish; and this is the case with which your Lordships have now to deal.

"In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words, some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be decribed as obtained by coercion. So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his

bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud.

"One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence, is on the party who alleges it. Undue influence cannot be presumed, and, looking to the evidence in the present case, I am unable to discover evidence warranting the conclusion at which the jury arrived, supposing them to have proceeded on the ground of undue influence. . . . .

"The most I can find, if indeed that can be found, is evidence to show that the act done was consistent with the hypothesis of undue influence; that the instrument, though apparently the expression of his genuine will, might in truth have been executed only in compliance with the threats or commands of his wife, or that he had been led to execute it by unfounded prejudices artfully instilled into or cherished in his mind by his wife against those who would otherwise have been the probable objects of his bounty.

"But in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Can it be truly said that there is any such inconsistency here?

"The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But this principle must not be carried too far. Where a jury sees that at and near the time when the will sought to be impeached was executed, the alleged testator was, in other

important transactions, so under the influence of the person benefited by the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised. But even allowing the utmost latitude in the application of this principle, I feel compelled to say that I do not discover the proof of anything sufficient to show undue influence in the obtaining of this will. . . . .

"On the grounds, therefore, which I have pointed out [including much not here quoted], I am of opinion that the *Lord Chancellor of Ireland* was wrong in refusing the motion for a new trial. The consequence is, that the order of the 18th April, 1853, refusing the new trial, must be discharged, and the cause must be remitted back to Ireland, with a declaration that a new trial ought to have been ordered." . . . .

Orders and decree reversed, with declaration and remit.

Lords' Journals, 13th March, 1857.

UNDUE INFLUENCE.—BURDEN OF PROOF.

In re Liney's Will.[1]

SURROGATE'S COURT, MONROE COUNTY, NEW YORK, 1890.

(13 N. Y. Supp. 551.)

Proceedings to revoke probate.

Adlington, S.—This decedent was an illiterate, intemperate, credulous old man, past eighty years of age. He was feeble both in body and mind, subject to certain delusions, and, while probably of sound mind in a strictly legal sense, was so feeble in will and intellect as to be easily influenced and controlled by other people. During the last half year of his life he had executed three wills, the last of which is now the subject of controversy. By the first two wills he had given to his son and grandchildren nearly all his property, and in making such wills had shown much readiness to heed the suggestions of outsiders as to the form of his testamentary dispositions and the appointment of executors. Within two

[1] Affirmed by the Supreme Court (38 State Rep. 1022), and by the Court of Appeals (43 N. Y. State Rep. 961).

weeks after the date of the second will, and while temporarily sojourning in the house of a friend, the third will is executed by him, giving the great bulk of his estate to that friend and his wife. No satisfactory reason appears for the sudden change of purpose in this feeble old man. Upon the persons claiming to benefit by a will made under circumstances such as surrounded this transaction by an aged and feeble-minded man, the law devolves the duty of proving that the instrument was the voluntary outcome of the decedent's own wishes, and was not procured by the improper influence of the beneficiaries. Unless this is satisfactorily shown, the presumption arises that the will is the result of undue influence or fraud, and it should not be allowed to stand. Marx v. McGlynn, 88 N. Y. 357; Mowry v. Silber, 2 Bradf. Sur. 133; Will of Clausmann, 24 Wkly. Dig. 226. Such fraud or undue influence is not usually open and visible to the draughtsman of the will, or to the attesting witnesses, but is commonly exercised behind the scene. Mowry v. Silber, *supra*, 149. I think the facts and circumstances of this case warrant inference that this will was procured by the undue influence of the Murrays, the chief beneficiaries under it, and that the probate should therefore be revoked. There may be a decree accordingly, on three days' notice.

UNDUE INFLUENCE.—TESTATOR'S DECLARATIONS BEFORE EXECUTION.[1]

Denison's Appeal.

CONNECTICUT SUPREME COURT OF ERRORS, 1860.

(29 Conn. 399.)

Hinman, J.—We think the Superior Court erred in rejecting the evidence of the declarations made by the testator before the execution of his will, and before there was any claim that his mind had become impaired, that none of his property should ever go into the family of Ledyard Park. His will was directly contrary to what might have been expected if he was sincere in making the declaration, as appears by the will itself, which, in fact, disposes of the bulk of his whole estate to Ledyard Park and his children. The questions before the court were whether, at the

[1] See Waterman v. Whitney, given *ante*.

time the will was made, the testator was competent to make it, and whether by fraudulent practices, operating upon an impaired or enfeebled mind, he was induced to execute the instrument as his will, when in fact it was contrary to his well-settled convictions of what was a just and proper disposition of his estate, in respect to the appellants and others standing in the same natural relation to him as his brother Ledyard, and to one of whom he seems to have been under some additional obligations. Declarations and acts of kindness and affection towards a legatee are usual and common circumstances, often relied upon in aid of a will. They go to show that a legacy, otherwise inexplicable upon the ordinary motives of human conduct, is a natural and probable act, and therefore a reasonable and free one. Of course, it would seem to follow that contrary declarations and acts must have a contrary effect. They tend to show both imposition and incompetency, because, where a will is made contrary to previously declared intentions, it is such an improbable and unexpected act as requires explanation before the mind is satisfied that it was deliberately and understandingly done. Such evidence may not always be very satisfactory, but we think it is admissible, and as little liable to be misapplied as any other, and sometimes may be very satisfactory and conclusive, especially when taken in connection with other circumstances. Should a testator dispose of his property to personal enemies, or entire strangers, to the exclusion of his intimate friends or relatives, it would strike the common sense of all men as an unnatural act, and would not be believed to be the free and voluntary act of a sound mind, without a full and clear explanation of it. If a will made in favor of the attorney or medical attendant of a testator, when drawn up by such attorney or attendant, requires explanation to remove the suspicion of imposition which otherwise attaches to it,[1] it seems to us that a reason equally strong, though not of the same character precisely, throws at least as much suspicion upon a will in favor of a personal enemy, or of one whom the testator is shown to have had a settled determination to exclude from any participation in his property. Every unnatural act is some evidence of imbecility or insanity, as it is only by an accumulation of such

[1] See Index, "Attorney."

acts that these conditions of the mind can be established. Standing alone it may be wholly inconclusive in its character; still, the court must receive it as evidence, or insanity could very seldom be established. Men are not expected to give their property to personal enemies, nor to make those of their connexions toward whom they entertain strong feelings of dislike the principal objects of their bounty, to the exclusion, either wholly or in part, of those standing in the same relation, and toward whom they entertain feelings of attachment growing out of personal kindnesses. Hence, nothing is more common than for judges, when commenting upon cases where near relatives have been passed by, and the property of a testator given to those unconnected with him by blood, especially if there was enmity between the testator and his relatives at all attributable to the faults of the survivors, to speak of them as "conspirators against themselves," and to remark that, under the state of feeling existing between them, no one would expect to find in the will of the deceased any provision for such survivors.

We suppose, therefore, that this evidence would have been received by the court, if the declaration offered to be proved had been made immediately, or but a short time before the will was executed; but that, under the circumstances, it was considered that the proof related to declarations made at too remote a period to be entitled to any weight. Hence the motion states that they were made long before the deceased executed his will. That such declarations might be made at so remote a period as to be entitled to little if any weight, unless succeeded by other acts or declarations showing that the state of feeling that called them forth continued up to the time the will was executed, is undoubtedly true. And it is equally true that they might be made under such circumstances as to indicate no settled feelings of hostility, or any determination ever to act upon them. And perhaps, if sufficient circumstances appeared in the motion to show that they could not have altered the verdict had they been admitted, we might not now feel called upon to advise a new trial. But the mere circumstance that they are stated to have been made long before the will was executed, is, we think, wholly insufficient for that purpose. If very remote, especially if succeeded by kind feelings, the jury would have given the declaration no weight, and the court might

very properly have so advised them. But if it had been succeeded by a long-continued state of hostile feelings, not shown to have been changed up to the time the will was made, time would seem rather to have added to than to have lessened its force. Indeed, circumstances calculated to enhance or to lessen or destroy the force of such declarations, quite too numerous to be mentioned, will occur to every intelligent mind. When shown in evidence, in cases as they arise, they would of course be proper for the consideration of the jury, in weighing testimony such as was offered and rejected in this case. And, in our opinion, the correct course would have been to admit the declaration made by the testator, and let the jury weigh it in connection with the length of time that had elapsed since it was made, and any other circumstances, if any existed, calculated to strengthen or weaken it.

But if it could be admitted that the length of time which had elapsed since the declaration was made, might be sufficient to authorize the court to reject the evidence, so as to prevent its being heard by the jury, it appears to us quite clear that no such length of time is shown to have elapsed in this case. The phrase "long before" is quite too indefinite for the purpose. To mean anything, as applied to the subject, it would seem to call for a length of time sufficient to allow the state of enmity which existed when the declaration was made to subside and be succeeded by feelings of an opposite character, and this would most probably depend on many other circumstances besides mere lapse of time. If the declaration was but the expression of a sudden and slight impulse of anger, a very short time might be sufficient to show that it had subsided, and the provocation that called it forth been forgotten. But the court cannot enter into an inquiry as to the attending circumstances with a view of determining upon the admissibility of the evidence. This would be but one mode of estimating its weight and importance under the circumstances, which is the province of the jury alone. We think, therefore, that on the ground of the exclusion of this evidence there must be a new trial.

The judge, in charging the jury, stated to them that mere inequality in the shares of the legatees standing in the same natural relation to the testator, was not, of itself, any evidence of unsoundness of mind or want of capacity to make a will. We do

not think this can be complained of under the circumstances. The expression, perhaps, is not technically correct, inasmuch as it may be evidence, and was in fact evidence in this case, which the judge at the time was commenting upon; but it is clearly insufficient evidence of itself to authorize a court or jury to set aside a will. The object of a will is to make a disposition of property different from what the law makes of it. And to say that it may be set aside for a cause like this, is little else than to allow it to be defeated because it is attempted by it to carry out the lawful purpose for which most wills are made.

Nor can the appellants complain of the neglect of the judge to charge the jury that the will was void on the ground that the bequests in it were given upon conditions subversive of the Christian religion. If the conditions were illegal they would be void, and the legatees would take the property free from any such restraints. We have no occasion, therefore, to examine the character of the conditions attempted to be imposed on the legatees under this will for the purpose of determining whether they are invalid or not. It is enough to say of them, therefore, that while they were of so unusual and extraordinary a character as to make it, at least, questionable whether they were not void, as subversive of all religion, for, whether christian or pagan, its teachers seem by the testator to be placed on the same footing, it appears to us that the only legitimate use which the appellants could make of the conditions, is as evidence of unsoundness of mind arising from the provisions of the will itself.

Upon the whole case, therefore, we advise a new trial, on the ground only of the rejection of the testimony offered to be proved by the witness Chapman.

In this opinion the other judges concur.

New trial advised.

UNDUE INFLUENCE.—TESTATOR'S DECLARATIONS BEFORE EXECUTION.

Gardner v. Frieze et al.

RHODE ISLAND SUPREME COURT, 1889.

(16 R. I. 640.)

Durfee, C. J.—This is an appeal from a decree of the municipal court of the city of Providence, admitting to probate the

will of Phœbe L. Gardner. The will was executed August 3, A.D. 1886, when the testatrix was somewhat over eighty years old. It gives the larger part of her property to three daughters, and gives to her son, Walter S. Gardner, the appellant, only a trifling legacy. The reasons of appeal alleged are that the will was procured by fraud, deceit, and undue influence. On trial in this court the probate was opposed on those grounds. In support of the will the court admitted, subject to exception, testimony to the following effect, to wit: That the testatrix had told her counsel, before the will was executed, that her said son annoyed her by his importunities for money; that he had to pay her money due to her for a dower right, and had several times importuned her to forgive the payments; that he had had his share from his father's estate, and she would give him nothing; that she made these statements at different times during a number of years before the will was made, said counsel having drawn one or more earlier wills; that she made similar statements to the counsel's partner, and also said to him that she always intended to give her property to her daughters, said statement having been made to said partner some years before the will in controversy was executed. The jury returned a verdict sustaining the will. The case is before us for alleged error committed by admitting said testimony.

We do not think the court erred in admitting it. Judge Redfield, in his treatise on the Law of Wills, says: "It is every-day practice, where probate is resisted on the ground of fraud, undue influence, or surprise, to admit the declarations of the testator previously made as to his testamentary intentions; and that, when the will corresponds to the declarations, it excites much less apprehension of improper practices than when it differs from them." 1 Redf. Wills, 567, 568. Such, so far as we know, has been the practice in this State. [The weight of the evidence offered on this point is, of course, another question, arising anew in each case. Kane v. Brown (R. I.), 20 Atl. R. 10.] It seems to us that no evidence can be more legitimate in disproof of fraud or undue influence, especially if the declarations have been repeated from time to time during a period of years before the making of the will and down to the making. The practice is well supported by authority. In Neel v. Potter, 40 Pa. St. 483, the will gave the

testator's real estate to his brother, Samuel Neel, and his nephew, James Neel. It was contested on the ground of alleged undue influence by members of the family of the devisees. Evidence was admitted on the part of the devisees that the testator had declared at intervals during a period of many years, that he intended to leave his farm "in the name of Neel." The evidence was decided by the Supreme Court of Pennsylvania to have been rightly admitted. The court said: "It would strongly rebut the idea of any such influence on the mind of the testator when making his will, if it were shown that he made it in accordance with a long-cherished purpose." See, also, Starrett v. Douglass, 2 Yates 46, 51; Irish v. Smith, 8 Serg. & R. 573. In Roberts v. Trawick, 17 Ala. 55, the will was impeached for fraud or undue influence, and the court held that declarations made by the testator ten years and repeated by him five years before its execution, going to show a fixed and settled purpose to make such a will, were admissible in evidence to rebut the charge of fraud or over-persuasion. And in Pancoast v. Graham, 15 N. J. Eq. 294, where the ground of contest was insanity, the court held that it was confirmatory of the sanity of the testator that his will was reasonable, and corresponded with his repeated declarations. See, also, Allen v. Public Administrator, 1 Bradf. Sur. 311; Patton v. Allison, 7 Humph. 320. So, evidence of declarations repugnant to the will have been admitted to impeach it for fraud and undue influence. Williamson v. Nabers, 14 Ga. 286, 308; Denison's Appeal, 29 Conn. 399; Hughes v. Hughes' Ex'r, 31 Ala. 519. If admissible to impeach, such evidence must, of course, be admissible to support the will. There may be a few contrary decisions, but we think that much the more numerous decisions and the better reasons sanction the admissibility of the testimony. Petition dismissed.

UNDUE INFLUENCE. — TESTATOR'S DECLARATIONS AFTER EXECUTION.—LEGATEE'S ADMISSIONS.[1]

Shaller vs. Bumstead & others.

MASSACHUSETTS SUPREME JUDICIAL COURT, 1868.

(99 Mass. 112.)

Will of Miss Bumstead. Probate allowed. Appeal.

Colt, J.—Several questions arising upon the admission and

[1] See following cases on admissions and declarations.

rejection of evidence at the trial are presented by this report. One of the most important, whether we regard its practical consequences, or the apparent, and to some extent real, conflict of authority, relates to the admissibility of the declarations of the testatrix made after the execution of the will. Such declarations were offered to sustain the allegations of fraud and undue influence, and ignorance of its contents, and were excluded.

That the instrument which contains the testamentary disposition of a competent person, executed freely and with all requisite legal formalities, must stand as the only evidence of such disposal, is generally conceded. Such a will is not to be controlled in its plain meaning by evidence of verbal statements inconsistent with it; nor impaired in its validity and effect by afterthoughts or changes in the wishes or purposes of the maker, however distinctly asserted. It is to be revoked only by some formal written instrument, some intentional act of destruction or cancellation, or such change of circumstances as amounts in law to a revocation.

Any invasion of this rule opens the way to fraud and perjury; promotes controversy; destroys to a greater or less degree that security which should be afforded to the exercise of the power to control the succession to one's property after death. But the rule assumes that the will sought to be affected has once had a valid existence. It is always liable to be impeached by any competent evidence that it was never executed with the required formality, was not the act of one possessed of testamentary capacity, or was obtained by such fraud and undue influence as to subvert the real intentions and will of the maker. The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defeat the will whenever this issue is presented. So it is uniformly held that the previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it. If, therefore, the state-

ment or declaration offered has a tendency to prove a condition not in its nature temporary and transient, then, by the aid of the recognized rule that what is once proved to exist must be presumed to continue till the contrary be shown, the declaration, though prior in time to the act the validity of which is questioned, is admissible. Its weight will depend upon its significance and proximity. It may be so remote in point of time, or so altered in its import by subsequent changes in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge.

Upon the question of capacity to make a will, evidence of this description is constantly received; and when the issue is one of fraud and undue influence it is equally material. The requisite mental qualification to make a will might exist, and be entirely consistent with such a degree of weakness, or such peculiarity, as would make the party the easy victim of fraud and improper influence.

The evidence is here offered only to establish the allegations of ignorance of the will, and of fraud and undue influence. The verdict of the jury at a former trial having established, beyond controversy now, that the will was made by one in possession of the requisite testamentary capacity, its admissibility is to be considered only upon the remaining issue.

To establish the charge of fraud and undue influence, two points must be sustained; first, the fact of the deception practised, or the influence exercised; and, next, that this fraud and influence were effectual in producing the alleged result, misleading or overcoming the party in this particular act. The evidence under the first branch embraces all those exterior acts and declarations of others used and contrived to defraud or control the testator; and under the last includes all that may tend to show that the testator was of that peculiar mental structure, was possessed of those intrinsic or accidental qualities, was subject to such passion or prejudice, of such perverse or feeble will, or so mentally infirm in any respect, as to render it probable that the efforts used were successful in producing in the will offered the combined result. The purpose of the evidence in this direction is to establish that liability of the testator to be easily affected by fraud or undue influence, which constitutes the necessary counterpart and com-

plement of the other facts to be proved. Without such proof, the issue can seldom, if ever, be maintained. It is said to be doubtful whether the existence and exercise of undue influence does not necessarily presuppose weakness of mind, and whether the acts of one who was in all respects sound can be set aside on that ground in the absence of proof of fraud or imposition. And it is certain that, however ingenious the fraud or coercive the influence may be, it is of no consequence, if there was intelligence enough to detect and strength enough to resist them.

The inquiry is of course directed to the condition at the date of the execution of the will; but the entire moral and intellectual development of the testator at that time is more or less involved; not alone those substantive and inherent qualities which enter into the constitution of the man, but those less permanent features which may be said to belong to and spring from the affections and emotions, as well as those morbid developments which have their origin in some physical disturbance. All that is peculiar in temperament or modes of thought, the idiosyncrasies of the man, so far as susceptibility is thereby shown, present proper considerations for the jury. They must be satisfied, by a comparison of the will, in all its provisions, and under all the exterior influences which were brought to bear upon its execution, with the maker of it as he then was, that such a will could not be the result of the free and uncontrolled action of such a man so operated upon, before they can by their verdict invalidate it.

As before stated, the previous conduct and declarations are admissible; and so, by the weight of authority and upon principle, are subsequent declarations, when they denote the mental fact to be proved. For, by common observation and experience, the existence of many forms of mental development, especially that of weakness in those faculties which are an essential part of the mind itself, when once proved, imply that the infirmity must have existed for some considerable time. The inference is quite as conclusive that such condition must have had a gradual and progressive development, requiring antecedent lapse of time, as that it will continue, when once proved, for any considerable period thereafter. The decay and loss of vigor which often accompanies old age furnishes the most common illustration of this. It is difficult to say that declarations offered to establish

mental facts of this description are of equal weight, whether occurring before or after the act in question. But, if they are equally significant and no more remote in point of time, they are equally competent, and may be quite as influential with the jury.

The difficulty in the admission of these subsequent statements of the testator has been that, while competent for the purpose above indicated, they are not, by the better reason and the most authoritative decisions, admissible to establish elements of the issue. When used for such purpose they are mere hearsay, which, by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purposes would go far to destroy the security which it is essential to preserve. The declaration is not to be wholly rejected, however, if admissible on other grounds; and it must be left to the judge carefully to point out how far it is to be rejected or received as evidence by the jury.

Ordinarily we should expect more or less evidence of the prior existence of those peculiarities which the subsequent declarations give evidence of; and in the reported cases this will generally be found to be so. It is not necessary to decide whether, in the entire absence of such evidence, subsequent declarations would ever be competent. Where a foundation is laid by evidence tending to show a previous state of mind, and its continued existence past the time of the execution of the will is attempted to be proved by subsequent conduct and declarations, such declarations are admissible, provided they are significant of a condition sufficiently permanent, and are made so near the time as to afford a reasonable inference that such was the state at the time in question.

The doctrines thus stated are maintained by the current of English and American authority.

In Provis v. Reed, 5 Bing. 435, the statements of the testator which were offered were regarded by the court as offered to prove specific acts of fraud and improper influence. The distinction here suggested does not seem to have been required in the case, and such statements were emphatically declared inadmissible by Best, C. J., as rendering useless the precaution of making a will. The same doctrine is recognized, and the principle discussed, in Mar-

ston v. Roe, 8 Ad. & El. 14, where Tindal, C. J., goes somewhat fully into the matter, although the precise question was upon the revocation of the will.

In New York, in the case of Jackson v. Kniffen, 2 Johns. 31, the point was raised and decided; and the statement of the testator that he had executed the will by force and for fear of being murdered, was rejected. The distinction taken in the more recent cases between such proof of exterior facts and such proof of mental *status* is not alluded to. And Spencer, J., in his dissenting opinion, favors the admission of the declarations, on the ground that they were the declarations of the sole party in interest at the time, because no one else could have an interest in a will, living the testator. The whole matter is discussed more fully, and the distinctions accurately pointed out, in Waterman v. Whitney, 1 Kernan 157; (11 N. Y. 157; given *ante*). Subsequent declarations inconsistent with the will, in connection with other evidence tending to prove want of mental capacity, are held by Selden, J., and a majority of the court, to be competent, upon a full review of the decisions.

In Connecticut the same rule prevails and was stated in Comstock v. Hadlyme Ecclesiastical Society, 8 Conn. 254.

In Vermont, in the case of Robinson v. Hutchinson, 26 Verm. 47, where the question is fully considered, Isham, J., says: "We do not perceive any serious objection to the admission of this testimony, under that limitation, when the declarations were made so near the time of the execution of the will that a reasonable conclusion may be drawn as to the state of mind of the testatrix at the time the will was executed. Weakness of mind arising from advanced age, in connection with causes suggested in this case, is progressive and permanent in character. It exists in the mind itself, and therefore it is that weakness of mind at the time of making the will may be inferred from weakness subsequent, as much so as imbecility of mind under similar circumstances."

In Moritz v. Brough, 16 S. & R. 402, the Supreme Court of Pennsylvania held declarations admissible to show mental condition. See also McTaggart v. Thompson, 14 Pa. St. 149, 154.

In the recent case of Boylan v. Meeker, 4 Dutcher 274, the whole subject is discussed. The issues there were, incapacity, forgery of the will, fraud practised by inducing signature to a

paper without knowledge that it was a will. The court say that upon a review of the case no doubt can be entertained of the testator's capacity. The contestants relied on the conduct and declarations of the testator to show that he never knew afterwards of the existence of the will, and therefore could not have knowingly executed the paper. It appears that the declarations were offered on the broad ground that, even if the testator had testamentary capacity, yet he never executed the will, because of his declared ignorance of any such paper. In the discussion of the case, the court seem to regard ignorance of a fact existing at any particular time as not evidence of a state of mind in any sense affecting its capacity. But, however this may be, the whole case clearly recognizes the admissibility of subsequent declarations to prove mental condition, and is in harmony with the main current of authority. The declarations were held incompetent in that case, but it was upon the ground that the evidence was offered to support the act of fraud charged, and had no tendency to establish mental condition.

Two cases in North Carolina are apparently in conflict with these authorities—Reel v. Reel, 1 Hawks 248; Howell v. Barden, 3 Dev. 442. In the first of these the court follow, and approve of, the dissenting opinion of Spencer, J., in Jackson v. Kniffen, *supra*; and, in the last case, the court, by Ruffin, J., declare themselves bound by the former decision. It does not appear what were the precise declarations in this case; but in Reel v. Reel, in connection with the evidence that the mind of the testator had been greatly impaired by previous habits of intoxication, and had been weak from his youth, the declarations admitted may be held competent, without overruling Jackson v. Kniffen. See also Cawthorn v. Haynes, 24 Mo. 236; 3 Lead. Cas. in Eq. (3d Am. ed.) 503, note; 1 Redfield on Wills, 551–561.

This discussion, though thus prolonged, may not be dismissed without presenting another view upon which the evidence under consideration may be competent. A will made when fraud or compulsion is used may nevertheless be shown to be the free act of the party, by proof of statements in which the will and its provisions are approved, made when relieved of any improper influence or coercion. It is always open to inquiry whether undue influence in any case operated to produce the will; and, as the will

is ambulatory during life, the conduct and declarations of the testator upon that point are entitled to some weight. Indeed, the fact alone that the will, executed with due solemnity by a competent person, is suffered to remain unrevoked for any considerable time after the alleged causes have ceased to operate, is evidence that it was fairly executed; to meet which, to some extent at least, statements of dissatisfaction with or want of knowledge of its contents are worthy of consideration and clearly competent, however slight their influence in overcoming the fact that there is no revocation.

All this evidence, under whatever view it is admitted, is competent only and always to establish the influence and effect of the external acts upon the testator himself; never to prove the actual fact of fraud or improper influence in another.

Coming now to the application of these rules to the case here presented, we cannot avoid the conclusion that the report shows that evidence of the subsequent declarations of the testatrix to the effect that the will so made was contrary to her real intentions, or that she was ignorant of its contents, should have been admitted. The character and habits of the testatrix in her better days, the whole of her later life, with her expressed purposes and wishes up to the time of the will, were exhibited in evidence. With a considerable degree of physical weakness, that loss of vigor and activity in the mind, which indicates in persons of her habits and years the increasing infirmities and decay of old age, was shown to exist at and before the date of the will, for the purpose of increasing the probability that she was the victim of the improper designs of others.

The precise statements are not reported, nor does it appear at what precise time they were made, but they were offered to show either ignorance of the contents of the will, or that they were contrary to her real intentions, and that the will was improperly obtained by the fraud and undue influence of the executors named.

As we have already seen, this evidence was not competent as a declaration or narrative to show the fact of fraud or undue influence at a previous period. But it was admissible not only to show retention or loss of memory, tenacity or vacillation of purpose existing at the date of the will, but also in proof of long-cherished

purposes, settled convictions, deeply-rooted feelings, opinions, affections, or prejudices, or other intrinsic or enduring peculiarities of mind, inconsistent with the dispositions made in the instrument attempted to be set up as the formal and deliberate expression of the testator's will; as well as to rebut any inference arising from the non-revocation of the instrument. They were not rejected as too remote in point of time, or as having no tendency in their character to sustain the fact claimed to exist.

In connection with the evidence thus offered and rejected the contestants offered also the declarations and conduct of Hayden and Shailer, named executors, subsequent to the date of the will. And this brings us to another important question in the case. The evidence, for the purpose for which it was offered, was, we think, properly excluded. It was not proposed thereby to contradict their testimony. The admissions of a party to the record against his interest are, as a general rule, competent against him; and this rule applies to all cases where there is an interest in the suit, although other joint parties in interest may be injuriously affected. But it does not apply to cases where there are other parties to be affected who have not a joint interest, or do not stand in some relation of privity to the party whose admission is relied upon. A mere community of interest is not sufficient. Devisees or legatees have not that joint interest in the will which will make the admissions of one, though he be a party appellant or appellee from the decree of the probate court allowing the will, admissible against the other legatees. In modern practice, at law even, the admissions of a party to the record who has no interest in the matter will not be permitted to be given in evidence to the prejudice of the real party in interest.

In this case, it does not appear at what time after the date of the will these declarations were made, whether before or after the death of the testatrix, or before or after the offer of the will for probate; and perhaps it is not material. They stand upon the same ground with statements made at any time since the date of the will, by any other devisee or legatee named in the will, or heir at law or legatee under the former will of 1851, whose interests are affected and who is a party to this record. Before the death of the testatrix the interest of all these parties in a will, at any time to be revoked, was not such a direct interest as should render

their admissions competent against other parties. The separate admissions of each, made after the act, that the will was procured by their joint acts of fraud or undue influence, cannot be permitted to prejudice the other. Such statements are only admissible when they are made during the prosecution of the joint enterprise. Admitting for the present that any interest in a will obtained by undue influence cannot be held by third parties, however innocent of the fraud, and that the gift must be taken tainted with the fraud of the person procuring it, still it by no means follows that the interest of the other innocent legatees should be liable to be divested by the subsequent statements of the parties procuring the will. Such a rule would violate all sense of right, and is not sustained by the decisions.

The principal case, most often cited in support of the doctrine that such admissions are competent, is Atkins v. Sanger, 1 Pick. 192. The will was contested on the ground that the testatrix was not of sound mind and had been unduly practised upon. The declarations of one of the executors named, who were the principal legatees, were offered to show the circumstances attending the making of the will. Their admissibility was expressly urged on the ground that the parties to the record could not, as the law then was, be called as witnesses, and there was no way of proving the facts. The chief-justice, after a short consultation with his brethren, said the court were inclined to admit the declarations as to facts which took place at the making of the will, but added that the decision did not interfere with Phelps v. Hartwell, 1 Mass. 72. This is the whole of the case. It is to be noted that the case was heard before the full court without a jury. The rule may have been less carefully laid down than it would have been if the question had arisen on the admissibility of the evidence in a jury trial. Under the present law of this Commonwealth making parties to the record witnesses, illustrated in this very case by calling the parties whose admissions were offered and subjecting them to the cross-examination of the contestants, we cannot think the rule now contended for would have been adopted, as it seems to have been in Atkins v. Sanger.

In Ware v. Ware, 8 Greenl. 42, which was an appeal from the decree allowing probate of John Ware's will, the appellee was permitted to prove that Abel Ware, the only appellant, said, two

or three weeks before the death of the testator, that he had his senses. This case, so far as it permits the opinions of a party on the question of sanity to be put in evidence against him, is in conflict with Phelps v. Hartwell, *supra;* but on a closer examination it seems to be in harmony with the law as here stated. It does not appear that the appellant was not the sole party in interest. The fact that he was alone interested is to be inferred; for *Mellen*, J., in reference to this point, says that by law the confessions of a party may always be given against him and his interest, but not thereby to defeat or impair the rights of others claiming under him.

Upon principle, and by the weight of decided cases, we think there was no error at the trial in the present case in this respect. Clark v. Morrison, 25 Penn. State 453; Titlow v. Titlow, 54 Penn. State 222; Osgood v. Manhattan Co., 3 Cowen 612; Dan v. Brown, 4 Cowen 492; Hauberger v. Root, 6 W. & S. 431; Thompson v. Thompson, 13 Ohio State 358; Blakey v. Blakey, 33 Ala. 616.

The conduct of Shailer and Hayden in relation to the property and business of the testatrix stands on the same footing with their admissions. It had no legal tendency to establish the issue on the part of the contestants. The act could not be invalidated, so far as others at least were concerned, by their subsequent conduct. The codicil of 1857, if freely and intelligently executed, would of itself fully establish the will of 1853. But the conduct of either in procuring it was clearly incompetent on these issues. All the other specific subsequent conduct offered seems to have consisted of independent and disconnected acts, not in any way related to the making of the will of 1853. Any subsequent acts of theirs, or of any one else, by which the testatrix was in any way prevented from revoking or making any change in her will if she desired, or by which her relatives and friends were prevented or debarred in any way from free access to and communication with her, were expressly allowed to be shown. The deed of 1857 to Hayden, the consideration for which was inquired of in his cross-examination, was properly excluded as not tending to contradict his testimony. The facts inquired of were not material to the issue, and were not open to contradiction. The auditing of Hayden's accounts by Shailer in 1855, her dissatisfaction with

and continued employment of Hayden, proposed to be proved in cross-examination of Shailer, were circumstances too remote in point of time to have any bearing upon the mental *status* at the date of the will.

It was further objected that Hayden and Shailer were not competent witnesses under the statute. But this is not a case where one of the original parties to the contract or cause of action in issue and on trial is dead. They are not parties in a representative capacity. There was no cause of action in existence till the death of the testatrix. The controversy is between living parties. The testatrix is in no sense a party to the original cause of action. Her act was only the subject-matter of the investigation. The rule contended for would exclude parties on both sides in all cases where litigation should arise, growing out of the act of another during life. We cannot construe the proviso of the statute so as to exclude as witnesses all those who may be parties on one side or the other in all probate appeals like this; and we find no error in the ruling. Gen. Sts., c. 131, sec. 14. Baxter v. Knowles, 12 Allen 114.

Facts showing the mental and moral condition of the testatrix in July, 1854, and at various periods subsequent to that time, were offered, and excluded as being too long after the date of the will. To a great extent, it must be left to the presiding judge to determine upon the facts before him how far evidence of this description may have a tendency to throw light on the fact to be found, namely, the actual condition at the date of the will. Some limit must of course be had in applying practically the rules which govern the admission of this evidence. We do not perceive any reason to differ from the judge in the limit here applied. After July, 1854, her mental condition must have greatly changed. Her advanced age, and the paralysis with which she was at that time seized, seem to make that period a proper limit for the evidence offered; and we see no reason for sustaining this exception.

In regard to the offer to show that several of the family of the testatrix had been in advanced age affected by paralysis, accompanied by an enfeebling of the mental and moral powers, and that it was a family tendency, we are of opinion that no sufficient foundation was laid for the admission of such evidence. In ques-

tions of sanity, proof of hereditary tendency is competent in support of evidence of the existence of insanity in any given case. Here the sanity of the testatrix is not to be called in question. Her complaints of numbness in 1851, her physical weakness and mental inactivity prior to the attack of paralysis in 1854, do not justify the admission of the proof offered of hereditary tendency. No case is cited in which such evidence has been admitted in aid of the proof showing mere weakness of mind or eccentricity. 1 Redfield on Wills, 156, 157; Baxter v. Abbott, 7 Gray 75.

The only remaining point arises upon the manner in which the issues as framed were submitted to the jury by the presiding judge. It is claimed to be the duty of this court now to revise the order, upon exceptions or appeal taken in the usual way. In the matter of framing issues, proceedings in probate appeals are conducted in accordance with the rules and practice in equity. The findings of the jury in such cases are availed of to inform the court in matters of controverted facts which may become material in settling the final decree. They may be disregarded, in whole or in part, if on the final hearing they are not deemed important or relevant; or such new issues may from time to time be framed and submitted as a just regard to the rights of all may seem to require.

Three testamentary papers were here produced, purporting to have been executed in three different years. The like four issues were presented as to each. The court, having regard to the fact alleged, that the mental capacity of the testatrix had been seriously affected by severe illness between the years last named, ordered the issues tried separately; and those relating to the will of 1853 have been accordingly twice tried. Two of the issues at the first and two at the last trial were found in favor of the will. We cannot see that any injustice has been or is likely to be done by submitting the issues in this way to the jury; or that the trial of the issues upon the will of 1853 ought not now to be completed.

The exceptions having been sustained in the single respect above stated, the last verdict of the jury upon the issues relating to the will of 1853 is therefore set aside, and a new trial ordered upon the second and third issues relating to that will.

UNDUE INFLUENCE.—TESTATOR'S DECLARATIONS BEFORE AND AFTER EXECUTION.

Herster v. Herster.

PENNSYLVANIA SUPREME COURT, 1889.

(122 Penn. St. 239.)

Clark, J.—This issue, *devisavit vel non*, was framed in the Court of Common Pleas of Northampton County to test the validity of the last will and testament of Andrew Herster, deceased, and of the several codicils thereto. The will was made and executed 13th June, 1874; the first codicil, 28th August, 1878; and the second, 7th May, 1880. Andrew Herster died 27th May, 1882, at the age of 84 years, possessed of an estate estimated at $200,000, leaving surviving six children, viz.: Daniel Herster, Jacob Herster, Susan Kelper, Eliza Reich, Andrew J. Herster, and William Henry Herster. Of these, Andrew J. Herster is the principal devisee and proponent of the will, and William Henry Herster and Eliza Reich are the contestants. The only matter in issue under the pleadings is, whether or not the will and the codicils, or any of them, were procured by fraud or undue influence, the contestants who were plaintiffs below, maintaining the affirmative, and the proponents, the negative of that issue. That Andrew Herster was, at the time of making the will and codicils, of sound and disposing mind and memory, is therein assumed. No questions can be made as to this; the only proper matter for consideration being whether that mind and memory were in these testamentary acts, or in any of them, led captive by the artifice and undue influence of Andrew J. Herster, or of any other person in his interest, so that the written papers do not express the testator's true purpose in the disposition of his estate.

Undue influence is very nearly alike to fraud, yet they are not identical. While undue influence comprehends fraud, fraud does not embrace every species of undue influence. 1 Redf. Wills, 500*n*. It is only necessary, therefore, to consider the case upon the mere comprehensive question of undue influence, for this will embrace all sorts of artifice, imposition, or bad faith which characterize acts of fraud. Undue influence exists wherever through weakness, ignorance, dependence, or implicit reliance of one on

the good faith of another, the latter obtains an ascendency which prevents the former from exercising an unbiased judgment. To affect a will, it must, in a measure at least, destroy free agency, and operate on the mind of the testator at the time of making the will. The rule is well and forcibly stated by our Brother GORDON in Tawney v. Long, 76 Pa. St. 115, as follows: "Undue influence, of that kind which will affect the provisions of a testament, must be such as subjugates the mind of the testator to the will of the person operating upon it; and, in order to establish this, proof must be made of some fraud practiced, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy the free agency of the testator; and these influences must be proved to have operated as a present constraint at the very time of making the will." It may, in the language of the learned judge below, be exercised by means of misrepresentation and falsehood, directed against the persons who would be the objects of the testator's bounty, if the misrepresentation and falsehood so poisoned the mind of the testator as to destroy his free agency. It is a matter of common knowledge that a person of feeble intellect is much more easily influenced by undue means than is one of a vigorous mind. Therefore, in passing upon a question of undue influence the strength and condition of the mind may become a proper, indeed an essential, subject of inquiry; for, although weakness, whether arising from age, infirmity, or other cause, may not be sufficient to create testamentary incapacity, it may nevertheless form favorable conditions for the exercise of undue influence.

It is contended on the part of the contestants that although Andrew Herster must be presumed to have had testamentary capacity at the time of the making of this will and the codicils thereto,—and that cannot be questioned in this issue,—yet both his mind and body had in fact been greatly impaired by the infirmity of age and disease; that he was 76 years of age when he made his will, 80 when he made the first codicil, and 82 when he made the second codicil, and that he was aged 84 years when he died; that for 25 years he had suffered from a progressive general paresis or softening of the brain; that he had an apoplectic seizure a short time before the execution of the will; and that his memory was much impaired and his mind generally enfeebled.

In other words, that although the testator's mind was not enfeebled to the extent of testamentary incapacity, yet it was so weakened by disease and old age as to make the testator an easy prey to the artifice of his son, and that Jackson took advantage of his father's weak condition to procure the will to be made in his favor. The proponents of the will, on the other hand, contend that the testator was of a strong, robust, and resolute mind; that although advanced in years, and afflicted to some extent with the disease stated, he conducted business successfully and extensively throughout the whole period of his affliction, and until two weeks of his decease; that he was engaged extensively and profitably in the purchase and sale of cattle; that he kept his own accounts, made his own calculations, and drew his own checks in payment until the month in which he died; that within a year prior to his death he paid to three of the witnesses alone for cattle over $26,000, and within four months and one-half before his death he paid out with his own checks to different persons for cattle over $11,000; that it was the result obtained in his various business transactions after the making of his will which made further testamentary provision necessary; that Jackson, his son, had been a good boy, had remained at home with his parent, and had rendered him valuable and important services; that the old man had a high opinion of his son's business capacity, and on that account often deferred to his judgment in business matters; and that the provisions in his will, and the codicils in his favor, were a free and voluntary act of his father, prompted, perhaps, by his affectionate regard for his son, and a consideration of his personal services and worth. It will be seen, therefore, that undue influence is the substantial fact affirmed on the one side and denied on the other; imbecility or weakness of mind being a collateral or extraneous question arising out of the proofs.

The declarations of the testator, made within a reasonable time before and after the execution of the will, have always been received in evidence upon a question of testamentary capacity, to show the state and condition of the testator's mind; and, if reasonably connected in point of time with the testamentary act, we cannot see any reason why they would not be admissible to establish the same fact in an issue raised upon the exercise of fraud and undue influence in the procurement of it. Such declarations can-

not have any force, however, in establishing the substantive fact of undue influence. "It is certain such testimony is not admissible for the purpose of proving any distinct fact depending upon the force of the admission, since the testator is not a party to the question of the validity or interpretation of his will." Comstock v. Hadlyme, 8 Conn. 254; 1 Redf. Wills, 539. "The object of this testimony is to show such a state of weakness or vacillation of mind as rendered the testator an easy victim either of artifice, force, or fraud. Such declarations afford the most satisfactory evidence, not only of the strength of mind, but often exhibit those peculiar phases of the mind and of the affections, which especially expose the testator to be overcome by the terror of threats or the seductions of flattery. And although these declarations will necessarily afford some ground for judging in regard to the effect of any attempts of undue influence, that element in the testimony, not being legitimate, can only be eliminated by the judge in summing up to the jury." Redf. Wills, 548. "It is apparent that the declarations of the testator that he did not execute his will freely, that he never intended to have made such a will, and never should but for the influence of those persons in whose favor it is made, and similar declarations, which are very common in the testimony elicited in testamentary causes, can be of no force whatever as testimony tending to establish the truth of the declarations. In that light, such declarations are mere hearsay, depending for their force upon our confidence in the veracity of the person making them, and in most cases easily explained, without regard to the question of their truth, and which have always been rejected as evidence." Id. 550. Testamentary capacity being the normal condition of a person of full age, it follows that, in the absence of evidence of undue influence, proof of the testator's declarations should be excluded, or wholly disregarded on that question. Therefore, in Moritz v. Brough, 16 Serg. & R. 403, it was held that to set aside a will, duly executed by a man of competent understanding, evidence is not admissible of declarations made by him that he intended differently and was importuned by his wife; or of the wife's high temper and importunities with the testator in relation to his will. So in Hoshauer v. Hoshauer, 26 Pa. St. 404, the testator's mental capacity was not disputed. The will was made in 1853. To show undue in-

fluence the contestants offered to prove that in 1855 the testator said he had "made a will," that he had "made it as John wanted it"; that he had "to make it as John wanted it"; and that he "knew it was wrong." The offer was rejected, and upon error it was held that it was rightly rejected. Mr. Justice LOWRIE, delivering the opinion of the court, said: "This could not prove fraud in procuring it, though nearly all the estate was given to John's children, himself getting a dollar. An instrument that for two years remained subject to change or cancellation at the maker's pleasure cannot be set aside on such a declaration. A man who is competent to make a will can so easily correct any of its provisions, however obtained, that it is hard to imagine any kind of declarations of his that would prove it to be fraudulent, when any considerable time has intervened between its execution and his death." So, also, in McTaggart v. Thompson, 14 Pa. St. 149, where the validity of a will was questioned both for want of testamentary capacity and for exercise of undue influence, the contestants offered to prove the testator's declaration, made after the execution of the will, to the effect that in the making of it he has been imposed upon by those in whose favor it was made. The offer was refused, and upon that ground the case was removed to this court. "The court appears," said Mr. Justice ROGERS, "to have excluded the testimony because they chose, contrary to the offer, to suppose it was designed to prove duress, for which purpose it would be clearly inadmissible. But the court had no right to act on the supposition that the testimony was proposed in bad faith. As it was offered for a legitimate purpose, for that purpose it ought to have been received. If attempted to be used for a different purpose the correction was in their own hands; the counsel would subject themselves to the severest censure. If the facts were as represented, it was evidence of imbecility of intellect, amounting almost to fatuity." To the same effect is the current of authorities in other States. Robinson v. Hutchinson, 26 Vt. 38; Richardson v. Richardson, 35 Vt. 238; Shailer v. Bumstead, 99 Mass. 112; Kinne v. Kinne, 9 Conn. 102; Provis v. Reed, 5 Bing. 435; Jackson v. Kniffen, 2 Johns. 31; Pemberton's Will, 4 Atl. Rep. 770; Waterman v. Whitney, 11 N. Y. 157; Stevens v. Vancleve, 4 Wash. C. C. 265. In order that the declarations of the testator may be considered at all upon issue of

undue influence, there must be proof of other facts and circumstances indicating circumvention or fraud in the procurement of the will (Tawney v. Long, *supra*), for they are received, not as proof of the fact, but merely to show that there are special grounds for apprehending, and unusual opportunities for exercising, undue influence, and to illustrate the effect of such influence after its existence has been established, unless, perhaps, as part of the *res gestae*, when they are made at the very time of the execution of the will, and form part and parcel of the transaction (Smith v. Fenner, 1 Gall. 172; Boylan v. Meeker, 28 N. J. Law 274; Harrison's Appeal, 100 Pa. St. 458). The weakness of mind and consequent susceptibility to influence which is admissible in such a case must be shown to exist at the very time of the testamentary act; while the testator's declarations directly show only the state of his mind when they were made. Declarations made before and after have some significance, however, in showing inferentially the mental condition at the time of the testamentary act. The limitations which govern the admission of this quality of evidence must depend largely on the character of the unsoundness attempted to be proved. There are types of mental unsoundness which appear suddenly, and are of short duration, and in such cases the proof, to be of any avail, must come near to the precise time when the act was performed; but the decadence of old age, and many forms of mental derangement and imbecility, are of slow advancement, and proof of their distinct development at any given period will afford pretty clear ground to infer their existence for a long period, either before or after, with a considerable degree of certainty. Grant v. Thompson, 4 Conn. 203. Therefore declarations made several years even before the execution of a will may be shown to show unsoundness or imbecility of mind of a permanent character; and declarations made after may, in like manner, tend to show such a fixed perversion or imbecility of mind as would not be likely to have occurred in any short period of time; and both or either may afford some just ground of opinion in regard to the state of the testator's mind at the date of the testamentary act. 1 Redf. Wills, 549. The court must judge in each particular case how far it will be profitable to extend the rule before and after the precise date in question. Grant v. Thompson, *supra*. As the proof of the testator's declarations is

only admissible in this case to show the state of his mind, and the effect of undue influence, if any is shown to have existed, we cannot say, in view of the particular type of mental unsoundness alleged, and the peculiar circumstances of this case, that the scope of the investigation was too wide. Of course, the objective point of inquiry in every case is the state of mind at the precise date of the testamentary act, but, as it is not practicable in all cases to make that inquiry in a direct manner, some latitude of proof must be allowed.

At the first trial of this case, the learned judge of the court below instructed the jury in the most explicit and proper manner that these declarations of the testator were not evidence at all as to the fact of undue influence, because there was no evidence that they were true. "For all that appears," says the learned judge, "they may have been the expression of a mere delusion on the part of the testator." At the second trial, however, the court received the evidence, and submitted it to the jury, without any qualification whatever. Whether this omission was the result of a change of opinion respecting the force of the evidence, or was a mere inadvertence, or whether the learned judge inferred from the opinion of this court, delivered when this case was here before, that such declarations were deemed proper evidence of undue influence (11 Atl. Rep. 410), we cannot say. Of one thing we are certain; that the failure to qualify the effect of this evidence was fatal to the defendant's case. There is, in the concluding clause of the opinion referred to, enough, perhaps, to give the impression that the declarations of the testator, made a few days prior to his death, as to his unsuccessful attempt to get possession of his will from Lynn, followed by his exclamation on the day of his death, "*Mein Gott in Himmel, es ist alles letz, alles letz!*"—"My God in Heaven, all is wrong, all is wrong!"—were deemed proper evidence of undue influence. But the law is too well-settled on this point to admit of any doubt. The testimony was admissible, perhaps, but it was for the consideration of the jury only on a certain event, and then for a special purpose, to show the state and condition of the testator's mind; and, as the declarations were made eight years after the execution of the will, and four years and two years after the making of the codicils respectively, and then were uttered almost in the last moments of

the testator's life, they were, it must be conceded, of little force or inferential effect, under the circumstances, even as to that. We then said in advance we could not "say that the answers to the proposed questions would not indicate the exercise of undue influence," etc. Now that the answers are before us, we can without hesitation say that they are not. The defendant's counsel, by a point more particularly directed to this branch of the evidence, might have directed the attention of the court to the proper application of this part of the evidence in a more direct manner than appears to have been done; but we think the question is raised in the answers to the defendant's fifth and sixth points. Although these points were not directed to the precise question now under consideration, yet the answers of the court proceed plainly upon the assumption that the testator's declarations might be regarded as indicating undue influence, or present constraint, operating upon the mind of the testator in the testamentary act; and upon this ground the judgment must be reversed.

In the former opinion of this court it was held that the evidence was sufficient to justify a submission to the jury. The testimony was then and is now very voluminous, the evidence embracing over 1,000 pages of printed matter, and perhaps we did not give it that exhaustive examination and patient study which we have since been enabled to do. The whole case is now before us, and we are constrained to say that the testimony bearing upon the precise question at issue is certainly of the most meagre, unsatisfactory, and inconclusive character. It is said that Jackson Herster stood in a confidential relation to the testator; that he was the testator's son, and was to some extent intrusted with his father's business; but he was not present at the making of the will, nor does it appear that it was made by counsel at his procurement. The testator went to Mr. Lynn, who had been his attorney and counselor for fourteen or fifteen years, and, in the absence of all his children, with the greatest deliberation arranged for the preparation of his will. That Jackson was a son was certainly in his favor; that he was intrusted with his father's business, and, in this respect, occupied a confidential relation towards him, is also a circumstance in his favor, if he performed his duty faithfully and well, and did not take advantage of his position, or abuse the confidence reposed in him in the procure-

ment of the will. There is not the slightest proof that he took any part in the actual preparation of the will, or of any of the codicils; indeed, that he was even present when they were made and written, or when they were signed. Under these circumstances the burden of proving undue influence is clearly upon those who allege it. The unequal disposition which the testator made of his property, under the circumstances of this case, is not of great significance. "There may be cases," as was said in Patterson v. Patterson, 6 Serg. & R. 56, "where this internal evidence, added to other proof which would of itself leave the question doubtful, ought to turn the scale." But the inequality in the provisions of this will, taken in connection with all the evidence referred to, is not such as would induce any reasonable belief that in the making of it the testator was acting under any improper influence; and especially is this so in view of the evidence which has been introduced to explain the reasons and disclose the motives which probably actuated the testator in this disposition of his property. The very object of making a will is to disturb the equality of distribution which the law establishes in the absence of one; and whether the reasons for it, in the testator's mind, are well or ill founded, is immaterial, if he has arrived at the result of his own volition, and without any fraud, coercion, or constraint of others. It is only when the will is grossly unreasonable in its provisions, and plainly inconsistent with the testator's duty to his family, that, in case of doubt, the inequality can have any effect on the question of undue influence. The evidence in this case is not, in our opinion, of such a character as to leave the question at issue in doubt. On the contrary, the uncontradicted proofs abundantly explain the testator's motives in making his will as he did.

Apart from the internal evidence supposed to be afforded by the will itself and the confidential relation referred to, and applying to the declarations of the testator as evidence of the state and condition of his mind, the evidence of undue influence consists mainly of the testimony of five witnesses: Amandas Fry, Charles Haibing, Hannah Weaver, Samuel Weidknecht, and Henry Weidknecht. The circumstance related by Amandas Fry is of the most inconsequent character. In the year 1880 or 1881, he told the testator he had a lot on College Hill that Jacob

would like to have. The price was $7,500. The old man promised to go up and see it. Failing to do so, Fry went to see him again. He says: "I told him, 'Daddy, you did not come up to see my place.' He said, 'No, I did not.' Then he said something about having a fall, and hurt his thumb or finger,—I forget where it was,—and he couldn't get up, but that his son Jake told him that the property was cheap, and they might as well buy it, because they had the money lying idle. But he said, 'I'll see Jack first'; and then he called Jack, and he told Jack about it, and said, 'Here's Fry about that lot on College Hill. Jake says it is cheap, and we might as well buy it.' Jack said, 'No, father; we have got enough borough property. If we want to buy property, buy farms.' Then the old gentleman said, 'Well, if you say so, all right'; and that ended the matter."

Charles Haibing lived in the testator's family from April, 1880, for nine months. He returned in the spring of 1881, and left some time previous to the old man's death. His testimony relates chiefly to the conversation of the family while at their meals. In speaking of what Jack and his wife said at the table in the old man's presence, he says: "They allowed that Jake's children were running around and spending their money, and that if he got such things he would not take care of them. *Question.* Was this said upon more than one occasion, or only once? *Answer.* Frequently. *Q.* What effect did it have apparently on the old man? what would he say? *A.* Well, he would generally side in with the family. *Q.* Did you ever hear anything said about Henry or his wife or his children? *A.* Yes, I did. *Q.* What did he say about them? *A.* Well,—no offense to the lady there, or the family,—I shall speak the remark as it was spoken at the place. *Q.* Who said it? *A.* Jack Herster; 'Beck, fat Beck.' *Q.* What did he say about them besides? *A.* Well, that the children were no good, running around, and out on the streets nights, and Hen Herster running around, and the like of that. *Q.* Did you hear Jack say anything about his sister Susan? *A.* Yes, Mrs. Kelper and her Rosa. *Q.* What did he say about her? *A.* That they were a stuck-up set, and that if they got anything they would not take care of it. *Q.* When they said this, what did the old man say? *A.* Well, the old man would side in with them. He would have the same opinion, apparently, to me. *Q.* Did he

say anything about Eliza, Mrs. Reich? *A.* Yes. *Q.* I mean Jack; what did Jack say? *A.* As I understand, Mr. Reich stole a cow, and drove her to Allentown or Catasauqua,—I am not certain which of the two places,—and sold this cow; and the old man, of course, had bitter feelings against Mr. Reich on that account, and I often heard the remark made that they should not have anything. *Q.* Heard Jack say it? *A.* Yes. *Q.* Was anything said about Dan by Jack? *A.* Yes. *Q.* What? *A.* Said that Dan was a drunken man, and did not take care of his business; that he owed the old man so much money for cattle, as I understood, and that he had had enough for his share, and would not get any more; and his Irishwoman and the two boys, they wouldn't get nothing. *Q.* Dan's wife was an Irishwoman, was she? *A.* As I understand it, yes. *Q.* What effect did that have on the old man? *A.* Well, he would have the same opinion. *Q.* Would he be in a good humor or angry? *A.* He certainly would be out of humor when the rest spoke that way, and he would side in with them. *Q.* Would he swear any? *A.* He never would curse any. Oftentimes, in German, he would use an oath, but I never heard him go to the extreme. *Q.* What would he say in German? *A.* He would say 'Sockerment,' and the like of that."

Hannah Weaver was employed as a servant in the family in the year of 1877. She says: "Rosa Kelper,—that was Susan Kelper's daughter,—yes, she came there one day,—I think it was on Saturday,—and she came there with some flower-seeds, and she had a brown silk dress on, and the door was open between the kitchen and the old man's room, and so I said, 'Was that Miss Kelper?' after she was gone, and she said, 'Yes, that was Rosa Kelper; but she would not need to put a silk dress on to come up here to me,' and then the old man said something, but I am not positive what he said, but he was very angry about it." "*Question.* Did Mrs. Herster say anything more to him about not holding out, or anything of that kind? *Answer.* Oh, yes; she said that wearing them silk dresses,—she said that that would not hold out; and then the old man said, 'Yes; it won't if they have got to have it from me,'—something in that way it was. *Q.* Do you remember on different occasions anything being said to the old gentleman about the different children, by Mrs. Andrew Herster?

Do you remember anything being said there at breakfast about not being able to sleep at night? *A.* Yes, one morning the old man got up and was angry,—that was the old man Herster. *Q.* Who else was there then? *A.* I, and Jackson and his wife, and the boys at the table; and then they said they could not sleep at all last night. *Q.* Who said that first? *A.* Why, Jack. *Q.* Then what did the old man say? *A.* That he could not sleep either; and then Jack said, 'Yes, they were playing on the piano all last night.' *Q.* Who? *A.* Why, Jack said that; that he could not sleep; that Henry's children were playing on the piano all night; and then he said, 'Yes, he better—' *Q.* Who? *A.* Why, the old man said, 'He better learn his girls to play on the piano, but when Clara comes around I will give it to her.' *Q.* What did Mrs. Jack Herster say? *A.* 'Yes,' she said, 'if I had girls you bet they would learn to milk.' *Q.* What was the old gentleman's manner? *A.* Well, he was cross, angry. *Q.* Did you ever hear any piano-playing over there? *A.* No, I slept on the third story, and I did not hear any. *Q.* Did you ever hear any piano-playing over there? *A.* No; I heard a little music over there, but I don't know what it was, whether it was an accordion or mouth-organ, or whatever; but I never heard a piano. *Q.* Do you remember anything being said about how the piano was brought there? *A.* Yes; the piano was brought in there, and it was so large they couldn't hardly get it into the house. *Q.* Who said that? *A.* Mrs. Jackson Herster. *Q.* When? *A.* The same morning at the table. She said that they brought the piano, and it was so large they could not get it in the door hardly; and it is about all that was said. *Q.* Do you remember on any other occasion when anything was said about David? *A.* I think it was something, but I can't just remember how it was. *Q.* Do you remember anything being said about his being drunk? *A.* Yes, it was said he was a regular drunkard. *Q.* Who was that by? *A.* It fell at the table, but I can't tell whether it was Jackson, or his wife; it was either one. They said it to the old man, and I sat by and heard it."

Samuel Weidknecht testifies that the old man, in any business matter, would generally have his own way with other people, but he generally agreed with Jackson.

Henry Weidknecht says that the old man seemed to be guided

a great deal by Jackson, and was different in his manner towards Jackson from what he was to other people.

Reuben Kolb testifies that he seemed to be a little afraid of Jackson, that is, more yielding; that he was usually a man of much determination, and was firm in his opinion with others, but that he yielded readily to Jackson.

This is a summary of all the testimony bearing directly upon the fact of fraud or undue influence, and, consisting as it does of matters occurring, some three years and some six years after the will was made, it is certainly of the most inconclusive character. There is, in our opinion, no evidence from which a jury would be justified in inferring fraud, duress, or undue influence, in the making of this will. In an issue *devisavit vel non*, the question of mental unsoundness or of undue influence ought not to be submitted to the jury where the evidence is of such unsatisfactory character that the court would not sustain a verdict upon it. Wilson v. Mitchell, 101 Pa. St. 505. "A court of law," says our Brother PAXSON, in Cauffman v. Long, 82 Pa. St. 72, "has a higher duty to perform than merely to answer points of law. It is its duty to see that the law is faithfully administered; and such administration requires that a man's will, the most solemn instrument he can execute, shall not be set aside without any sufficient evidence to impeach it. There is no redress here for erroneous or improper verdict. But where a case is submitted to a jury upon clearly insufficient evidence, such as no court ought to sustain a verdict upon, it is our plain duty to reverse. Sartwell v. Wilcox, 20 Pa. St. 117; Lower v. Clement, 25 Pa. St. 63; Silveus' Ex'rs v. Porter, 74 Pa. St. 448." "This court has indicated in a number of cases," says our Brother GREEN, in Herster v. Herster, 116 Pa. St. 612, 11 Atl. Rep. 410, "a rule by which to determine the granting of an issue; and it is equally applicable in determining whether a cause of this kind ought to be withdrawn from the jury. It is thus expressed in a recent case: 'If the testimony is such that after a fair and impartial trial resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence, it cannot be said that a dispute within the meaning of the act has arisen. On the other hand, if the state of the

evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed. This simple and only safe test is supported alike by reason and authority.' Kanuss' Appeal, 114 Pa. St. 10, 6 Atl. Rep. 394." Applying this rule, which would seem to be well settled, to the evidence in this cause, it must be conceded, we think, that it is wholly insufficient. Upon a careful review of all the testimony, this verdict could not be sustained; the court should have set it aside as contrary to the manifest weight of the evidence; and, if this is so, it is good ground for reversal here. The facts exhibited in evidence in this case to establish undue influence are, in general, of the most trivial character. The most grievous matters alleged are that Jackson said Eliza Reich's husband stole a cow, and that Dan was a drinking man; facts, however, which do not seem to be seriously denied. It does appear that Henry never had a piano, and it is probable that the old man knew that he had not, as he was actively engaged about the house for five years after this alleged misrepresentation. Statements to the effect that Jackson's children were "running around spending their money," that Henry's were "out on the streets nights," and that Mrs. Kelper's were a "stuck-up set," are criticisms that may have been well or ill-founded, according to the stand-point from which their conduct was observed, and the peculiar notions and temper of the observers. At the best, however, they have little, if any, force in establishing fraud or undue influence in the procurement of this will or of the codicils. And especially is this true in view of the fact that the alleged declarations were not only made after the will was executed, but several years after. There is some evidence of mental impairment, but the testimony is overwhelming that, notwithstanding this impairment, the testator retained a business capacity rarely found among persons of his age who have never been afflicted as the testator was. There is no evidence whatever of any statements made by Jackson or his wife to the prejudice of his brothers and sisters at or at any time before the making of the will. In order to invalidate a will, there must be evidence direct or circumstantial of a present operating restraint at the time of making it. Eckert v. Flowry, 43 Pa. St. 52; Wainwright's Appeal, 89 Pa. St. 220. Influences which do not appear

to be connected with the testamentary act are not sufficient to impeach a will. McMahon v. Ryan, 20 Pa. St. 329. If we are right in the views we have already expressed, it is wholly unnecessary to consider the several assignments of error in detail. The plaintiff has made no case for the consideration of the jury, and, as the whole case must go down, all questions incidentally arising during the progress of the trial go down with it. The judgment is reversed.

FRAUD.—TESTATOR'S DECLARATIONS BEFORE AND AFTER EXECUTION.

Griffith vs. Diffenderffer et al.

MARYLAND COURT OF APPEALS, 1878.

(50 Md. 466.)

Robinson, J., delivered the opinion of the court.

Certain paper-writings, purporting to be a will of Sarah Ann Griffith, deceased, dated the 20th of December, 1875, and a codicil attached thereto, dated the 7th of March, 1876, were offered for probate in the Orphans' Court of Baltimore City.

By these papers the testatrix gave to her daughters Emma Coleman and Sarah Ann Ruddach, *one thousand dollars each*, and after the payment of certain legacies of about *ten thousand dollars* to other persons, she gave the rest of her property, amounting to at least *one hundred and sixty thousand* dollars, to her son, David Griffith, and her daughters, Mary E. Farnandis and Alverda Griffith.

On the petition of the appellees, grandchildren of the testatrix, issues involving *fraud and undue influence* were sent to the Baltimore City Court for trial; and this appeal comes to us upon exceptions to the rulings of the court below.

As to the question presented by the first exception whether the right of cross-examination extends to the whole case or is limited to the matters in regard to which the witness has been examined in chief, there is a difference between the practice in this country and that which obtains in England. There, if a witness is called to prove any facts connected with the case, he becomes a witness for all purposes, and the other side may cross-examine him in regard to all matters relevant to the issues before the jury.

In this country the Supreme Court has decided that this right is limited to facts and circumstances connected with the matter stated by the witness in his *direct examination;* and if the other side proposes to examine him respecting other matters, they must do so by making him their own witness. Phila. & Trenton R.R. Co. vs. Simpson, 14 Pet. 448; Harrison vs. Rowan, 3 Washington Ct. Court 580; Ellmaker vs. Brinckley, 16 Leigh & Rawle 77. And this seems to us to be the better practice. There is no good reason why a witness called by one side to prove certain facts should be considered a witness of that side in regard to other matters *foreign to and in no manner connected with the facts proven,* and which the other side may desire to offer in evidence.

In this case, however, the question proposed to the witness is strictly within the rule laid down by the Supreme Court. The memorandum of instructions and the rough draft of the will, and the will itself, had been offered in evidence by the plaintiffs. The witness Venable had referred to all of these papers in his direct examination; he had testified that the memorandum of instructions had been delivered to him by Romulus Griffith, that finding some difficulty in understanding it he sent back for fuller instructions, and that these instructions were also communicated by Griffith; under these circumstances it was competent on cross-examination to ask the witness whether he made a fair copy of the rough draft embracing the additional instructions and submitted it to the testatrix, and whether it was approved by her as being in conformity with the instructions she had given.

These facts were *germane* to, and *connected* with, the circumstances under which the will was prepared, and in regard to which the witness had testified in his examination in chief. We should not, however, reverse the judgment on this ground because it appears in the subsequent progress of the case that the defendants had the benefit of this evidence, and they suffered, therefore, no injury by the ruling of the court.

In the second exception the defendants offered to prove by the same witness, that the instructions for the codicil were given to him by Romulus Griffith as coming from the testatrix, *what those instructions were,* and that he prepared the codicil in accordance with said instructions, and as prepared by him it was read and approved by the testatrix. But the offer does not propose to con-

firm this alleged statement of Romulus, by showing that the witness afterwards repeated it to the testatrix, and that she admitted it to be true, but only to show that she approved and executed a codicil that had been prepared according to her alleged instructions as received by Romulus. This might be true, and yet the fact that the testatrix had directed Romulus to communicate the instructions would, after all, rest upon the witness' statement of what Romulus told him. It was, in fact, an attempt to prove by the witness that Romulus told him what the testatrix's instructions were, or, in other words, to prove by the witness that Romulus told him what the testatrix had said. There was no error, therefore, in sustaining the objection to this question.

The questions arising under the third exception are of considerable importance in the trial of testamentary cases, and not altogether free of difficulty. How far, and for what purposes, the *declarations of a testator*, made *after the execution* of his will, may be offered in evidence under *issues of fraud and undue influence*, the decisions are conflicting. We do not propose to examine the many cases in which the subject has been considered, for this has already been done in Waterman vs. Whitney, 1 Kernan 168; in Boylan vs. Meeker, 4 Dutcher 274, and other cases, and it is unnecessary for us to do more than state the conclusions we have reached.

Where such declarations are made so remote as not to constitute a part of the *res gestae*, they cannot be offered as independent evidence to prove the charge of fraud, or to show the *external acts* of undue influence, or attempts to influence the testator to make a will in a particular direction.

If offered for this purpose, they are inadmissible on two grounds. 1st. As mere hearsay evidence, which by reason of the death of the party whose statement is offered, can never be explained or contradicted by him. 2d. It is inconsistent with the Statute of Frauds to permit a will executed with all the formalities required by the statute to be impeached, or its validity in any manner impaired by the parol declarations of the testator made after the execution of the will.

But the question, whether a will is the free and voluntary act of the testator, or the offspring of fraud, whereby his judgment was misled, or of influences operating upon him, in consequence

of which his will was made subordinate to that of another, depends upon whether he had intelligence enough to detect the fraud, and strength of will enough to resist the influences brought to bear upon him.

The character and degree of the fraud practiced, and the influence exerted, involve, therefore, necessarily, to some extent, the physical and mental condition of the testator at the time of the execution of the will. The influence that would be unlawful if exerted upon one advanced in years and in declining health, of a weak and vacillating will, might be altogether unavailing with one in robust health and of firm and resolute purpose. Any evidence, therefore, which tends to prove the precise mental condition of the testator, and to place him before the jury just as he was when the will was made, is admissible; and for this purpose the declarations of a testator may in some cases be the most satisfactory proof. It is a common practice to admit such testimony under issues involving testamentary capacity, and upon the same grounds it ought to be received under issues of fraud and undue influence, provided they are made sufficiently near in time, as to justify a reasonable inference, that the mental condition which they are intended to denote, existed at the time of the execution of the will. Such evidence, it is true, may have an effect beyond that for which it can legitimately be offered; and although not competent to prove the facts upon which the charges of fraud and undue influence are founded, they may nevertheless tend to bias or prejudice the mind of the jury.

The objection, however, applies also to other species of evidence, which is competent for one purpose, but not competent for another, and if it be admissible under the general rules of evidence, we cannot exclude it on that ground.

We are of opinion, therefore, that the declarations of the testatrix to Mary Whitman, in November, 1876, "that she had made a will," "that she was dissatisfied with it," "that she had been persuaded to make it," "that she was sorry she hadn't let the law make a will for her, as it had for her husband, so that the children would have shared alike," "that she had done great injustice to her other children and to her grandchildren," naming them; "and was troubled about it," and "sometimes tempted to destroy it," and other like declarations were admissible for the purpose

of proving the *mental condition* of the testatrix at the time of the execution of the will and codicil, but for no other purpose.

We are of opinion also, that her declarations in regard to her testamentary intentions made in May, 1875, some months before the execution of the will and codicil, and before any improper influences are supposed to have operated upon her, are admissible. Evidence of this character may be offered either to rebut the charges of fraud and undue influence, by showing that the will is consistent with the long cherished wishes of a testator, or that it is contrary to well-settled convictions of what he thought was a just and proper disposition of his property among others standing in the same natural relation with those benefited by the will. The weight to be given to such testimony is a question for the jury. Denmead's Appeal, 29 Conn. 309; Converse vs. Allen, 4 Allen 512; Turner vs. Clemson, 15 N. J. Equity 243.

We come now to the questions of law involved in the instructions granted and those refused by the court. And here it is necessary to understand precisely the issues the jury had to try. That the will and codicil bore the genuine signature of the testatrix; and that she was of sound mind and capable of making a testamentary disposition of her property, are admitted. The issues of *undue influence* were abandoned by the plaintiffs, and the only questions before the jury were *whether the will and codicil were procured by fraud.* The burden of proof was upon the plaintiffs. If they offered no evidence, or if it was insufficient to satisfy the jury that the papers offered for probate were procured by fraud practised upon the deceased, then the defendants were entitled to a verdict.

The court, however, instructed the jury, that if they found certain facts set forth in the plaintiffs' first prayer, *the burden of proof* was upon the defendants to satisfy the jury, that the will and codicil were in all respects the free, voluntary and intelligent acts of the testatrix, and if they failed to do so, the plaintiffs were entitled to a verdict. In other words, assuming these facts to be true, the burden of proof which originally rested upon the plaintiffs, was shifted to the defendants. This was equivalent to saying, that the facts enumerated in the prayer amounted in law to a *presumption of* fraud, because on no other ground could a jury find a verdict for the plaintiffs.

Now what are the facts thus relied on to support this presumption?

First, that Romulus Griffith was the *son-in-law*, *agent* and *attorney-in-fact* of the testatrix, and entrusted with the management of her affairs; that he employed his own counsel to draw the will and codicil, was consulted by the testatrix as to the making of said instruments, and otherwise took an active part in the preparation and execution of the same, by which his wife and himself were largely benefited. And it is insisted, that the doctrine recognized by courts of equity, in dealing with matters of gift and contract, between parties standing in a *fiduciary relation* to each other, should be applied if not in its broadest sense, yet in some qualified manner to gifts under wills. It is true, that such courts always watch with suspicion, transactions between persons standing in this relation, and although such transactions are not treated as altogether void, yet the burden of proof is upon the party holding the relation to show, that the influence necessarily arising from the confidence thereby reposed, has not been abused. And hence it is, that in gifts *inter vivos* between such persons, it is incumbent on the donee to show, that it was the free and voluntary act of the donor. But there is an obvious difference between a gift, whereby the donor strips himself of the enjoyment of his property whilst living, and a gift by will, which takes effect only from the death of the testator. And in Parfitt vs. Lawless, Law Rep., Probate and Divorce, vol. 2, 468, where the testatrix gave all her property to a Catholic priest, her confessor, it was expressly decided, that the doctrine of confidential relations as recognized by courts of equity, in dealing with gifts or contracts *inter vivos*, had no application to gifts under a will.

Lord PENZANCE says: "In the cases of gifts or other transactions *inter vivos*, it is considered by courts of equity, that the natural influence which such relations as those in question involve, exerted by those who possess it, to obtain a benefit for themselves, is an *undue* influence. The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent."

But in addition to the relation which Romulus Griffith bore to the testatrix, we have the further fact, that he was consulted by her in regard to making the will, that he employed his own counsel to draw it, and that his wife and himself were largely benefited by it. The fact that a party is largely benefited by a will prepared by himself, or in the preparation of which he takes an active part, is nothing more than a suspicious circumstance, of more or less weight, according to the facts of each particular case. If the testamentary capacity be doubtful, or if the party benefited be a stranger not allied by ties of kindred to the testator, these and other like facts would tend of course to increase the suspicion.

They are, however, but facts and circumstances to be considered by the jury in determining the question of fraud. But fraud in this case being a *question of fact* to be found by the jury, and not *one of law* to be inferred by the court, it was error to instruct the jury that the facts thus relied on by the plaintiffs created a presumption of fraud, or in any manner affected the burden of proof, which from the beginning to the end of this case rested upon the plaintiffs.

Then again, whatever suspicions these facts might excite, or whatever explanation they might require, the undisputed facts show not only that the testatrix was fully competent to make a will, but that the papers offered for probate were read and explained to her, and that she expressed herself fully satisfied with their contents. Whatever suspicion, therefore, the facts thus relied on might have excited, it was fully explained and removed by the uncontradicted evidence offered by the defendants. And it is no answer to say, that an instruction to that effect might have been asked by the defendants. It was misleading the jury to say that certain facts tended to create a presumption of fraud, and therefore to shift the burden of proof upon the defendants, if other facts in regard to which there was no conflict, showed that no such presumption could arise.

But then again it is said, there is a material variance between the will and the written memorandum of instructions, and this also is relied on as evidence of fraud. The testatrix was entitled to commissions amounting to about seven thousand dollars from her husband's estate. By her will, she gave to Romulus Griffith

and wife a sum equal in amount "to the commissions which she should receive during her life, and be entitled to at the time of her death." By the memorandum of instructions, she gave to Griffith and wife "her portion of the commissions on her husband's estate, if the said estate should not have been settled and commissions received before her death." And it is insisted, that even if the testatrix had received these commissions in her lifetime, and had paid them to Griffith and wife, yet they would be entitled under the will to an additional equal sum at her death. Now, if it be conceded that there is a variance between the will and the memorandum in this respect, there is not a particle of evidence to show that it was made with a fraudulent purpose. The will was drawn by the witness Venable, and he says, if there is a variance it was altogether unintentional on his part, and arises from an unhappy use of language. The appellants expressly disclaim any intention to impute improper motives to him, and if this variance escaped his attention, a lawyer and draftsman, it would be unjust and unreasonable to impute knowledge of it to Romulus Griffith, because the will was read in his hearing. Taking, therefore, all these facts together, and adding thereto every fair and reasonable inference, we are of opinion that they are not sufficient to create a presumption of fraud, or to shift the burden of proof from the plaintiffs to the defendants.

In addition to this, the instruction was clearly erroneous, in submitting to the jury under the circumstances surrounding this case, the question whether the testatrix *fully understood* the provisions and effect of the will and codicil. Knowledge of its contents is, of course, essential to the validity of every will, but where the testamentary capacity is unquestioned, such knowledge, as a general rule, will be inferred from the execution of the will itself. If there be suspicious circumstances surrounding the preparation and execution of a will tending to rebut this presumption, it may be proper to require additional proof of some kind that the testator did in fact understand its contents. But in this case it was not only admitted that the testatrix was of sound mind and capable of making a will, but the evidence shows that both the will and codicil were read and explained to, and approved by her. Under such circumstances as these, the law imputes knowledge, and the door of inquiry is closed. There may be excep-

tions to this rule, it is true, arising in cases of fraud practised upon a testator in the preparation and execution of his will, but it is not alleged here that one instrument was prepared and read to the testatrix, and another and a different one substituted in its place; nor is it alleged that any fraud was practised in reading the will or codicil. On the contrary, these papers were read to her, line by line, just as they were written; and being in the full possession of all her faculties, there is nothing to except this case from the operation of the general rule as we have stated it.

Then again, there is another objection to this prayer, and one which applies with equal force to the third prayer. Whether the will and codicil were procured by fraud, were *questions of fact* to be found by the jury, and not questions of law to be inferred or presumed by the court. The affirmative of the issue was upon the plaintiffs, and these instructions assume that if evidence is offered sufficiently strong to make out a *prima facie* case of fraud, the burden of proof was shifted to the defendants, and unless they offered evidence rebutting the *prima facie* case thus made, the jury were obliged to find that the will and codicil were procured by fraud. The court thus undertook to say, as matter of law, that the plaintiffs had proved the affirmative, or, in other words, had proved that the will and codicil were procured by fraud, instead of leaving this question to be found by the jury. Whether the defendants offered any evidence or not, the affirmative of the issue was none the less ultimately upon the plaintiffs, and it was incumbent on them to satisfy the jury that it had been established. To entitle the plaintiffs to a verdict, the jury must find as matter of fact that the will and codicil were procured by fraud.

The second prayer is based upon the theory, that the testatrix was induced to discriminate in her will and codicil against certain of her children and grandchildren, in consequence of false representations made to her by those benefited by the will and codicil, such persons knowing that these representations were false, and knowing that they would, and intending that they should, influence the testatrix in making this discrimination. In other words, that a downright fraud was practised upon her, in consequence of which, certain members of her family were excluded from a fair

participation in her property. Objection is made to this prayer in the first place, on the ground that there was no evidence to warrant the court in submitting to the jury the finding of the facts on which it is based. It is not the office of a judge to weigh or balance conflicting evidence, however strongly the evidence on the one side may preponderate. That is the duty of the jury. If no evidence is offered, or if it is not such as one in reason and fairness could find from it the facts sought to be established, the court ought not to submit the finding of such facts to the jury. Without meaning to intimate any opinion in regard to the weight of the evidence, or the conclusion a jury ought to draw from it, it was sufficient, I think, to warrant the court in submitting the facts set forth in this prayer to the jury. Upon this question the judges who heard this case are equally divided in opinion, and the prayer would, therefore, be affirmed by a divided court, but for one or two minor objections in regard to which we all agree.

Where a will is assailed on the ground of false representations instilled into the mind of the testator, it must appear that such representations were made for the *purpose of influencing* the testator in making his will. Now, in this prayer, the jury are required to find that the representations therein set forth, were made for the purpose of influencing the testatrix in making *her will*, but they are not required to find that they were made for this purpose *in regard to the codicil.*

Then again it instructs the jury if they find certain facts, "they *may find* that the will and codicil were obtained by fraud," and their verdict "*must*" be for the plaintiffs. In order to avoid any misconstruction, it should have been qualified by adding after the words "*were obtained by fraud*" the words "*and if they shall so find*," their verdict must be for the plaintiffs. As the case will be remanded for a new trial the prayer in these respects can be corrected.

It was also urged, that the several prayers offered by the plaintiffs were erroneous, because they assume if fraud was practised upon the testatrix in making her will and codicil, the *entire* will and codicil were void, although it might appear from the evidence, that the fraud affected *only certain parts* of the will and codicil. And it was insisted, that if the fraud did not affect the entire

will and codicil, the jury by their verdict should have segregated the parts thus affected by the fraud. This is a question of importance, and so far as our information extends, is now for the first time raised in this court. Whether under proper issues framed for the purpose of presenting the question, a jury may find part of a will void on account of fraud and another part good, it is unnecessary for us to decide.[1] No such issue was sent by the Orphans' Court to the court below for trial, and the question is not, therefore, presented by this record. The issues before the jury were, whether the will and codicil were procured by fraud? And their verdict must, of course, be responsive to these issues. Where a will is assailed on the ground of fraud and undue influence, if it is proposed that the jury shall find whether such fraud and undue influence affects the whole will or certain parts only, and what parts, it seems to us, there ought to be a separate issue framed presenting directly that question to the jury.

The plaintiffs' fourth, fifth, and sixth prayers announce well settled principles, and there was no error in granting them.

The issues of undue influence having been abandoned and no longer, therefore, before the jury, the court properly refused to instruct the jury in regard to the law applicable to such issues.

There was error in granting the plaintiffs' first and third prayers, and also in granting the second as it was presented, and the judgment will be reversed and a new trial awarded.

Judgment reversed, and new trial awarded.

(Decided 7th February, 1879.)

UNDUE INFLUENCE.—ADMISSIONS OF LEGATEE.

La Bau v. Vanderbilt.

SURROGATE'S COURT, NEW YORK COUNTY, NEW YORK, 1877.

(3 Redf. 384.)

Application for revocation of probate of the will of Cornelius Vanderbilt. The report gives a number of separate opinions rendered at different stages of the proceeding, on distinct questions. The question upon which the following opinion was rendered, was whether the declarations, or admissions, of one

[1] This may be done, if the illegal part is separable. 1 Jarman on Wills (Randolph & T.'s ed.) 86; Billinghurst v. Vickers, 1 Phillim. 187.

legatee, tending to show undue influence, or lack of testamentary capacity, were to be admitted to support the contest.

Calvin, S.—The apparent irreconcilability of the authorities bearing upon the subject, has caused some embarrassment in deciding the question raised, and will justify a full statement of the cases so far as they are applicable.

In Beall v. Cunningham (1 B. Mon. 399) it was held that the admission of one of several devisees, obviously against his interest, that the decedent had given him the paper propounded as a form of will, and told him "that it was a mere form, which he might dispose of as he pleased," was admissible. In Rogers v. Rogers (2 B. Mon. 324), in an action contesting the validity of a will the circuit judge had refused to permit proof of conversations in which the principal devisee stated a desire to own his father's homestead, and of another conversation in which said devisee remarked: "We have had too much trouble and difficulty in getting this will, to attempt getting another." On the authority of Beall v. Cunningham (*above*) the court on appeal held the testimony competent, and also stated the English practice of receiving admissions by one parishioner against the whole parishioners, where the question involved was common to all, as one could not be compelled to testify against himself and associates; and said the courts of Massachusetts and Pennsylvania had virtually applied the same rule in wills cases. But the decree was affirmed notwithstanding the alleged error, because the appellate court concluded that the party was not injured by the exclusion. In Fairchild v. Bascomb (34 Vt. 398) evidence that a legatee stated to one of his brothers (one of the contestants of the will), that he did not know that the deceased had made a will, and that about a week after, he stated to another brother the contents of the will, contrary to the fact less favorable to him, was received, it appearing that said legatee was present at the execution of the will, and that he was sole legatee. In Atkins v. Sanger (18 Mass. 192) evidence was admitted of the declaration of one of the executors and a legatee, as to facts which occurred at the time of making the will.

In Phelps v. Hartwell (1 Mass. 71) testimony was offered to prove a declaration of one of the legatees, giving his opinion that the testator at the time of making his will was not of sound mind.

Sedgwick, J., said that if the appellee who made the declaration were solely interested in establishing the will, he should be in favor of admitting the evidence, because he thought that evidence of opinions formed at the time might be fairly presumed to be among the best means of informing a party as to the real state of the testator's mind, but as the other appellee was interested in the establishment of the will, it would not be proper to admit the evidence offered. In Davis v. Calvert (5 Gill & Johns. 269), on a bill filed by one of the next of kin against the probate of a will, the plaintiff offered to show that the executor who propounded the will, in a conversation a few days after the death of deceased, declared that though he had promised the deceased to provide for certain children, he did not consider himself bound to do so, because he was convinced that they were not children of the deceased. The evidence was rejected. But this was held error, the court saying: "Calvert being executor and contingent devisee, representing every interest under the will, and being also defendant on the record, evidence of any relevant declarations or admissions by him, adverse to the will, and bearing upon the issues, or any of them, ought to have been admitted; the rule being that the admission of a party to the record is always evidence, though he be but a trustee for another, with certain exceptions not applicable to this case.

In Lewis v. Mason (109 Mass. 169) it was held that on the question of undue influence the statement of deceased's children made in his lifetime to another child, that such child should not stay in the testator's house, and that they had got the testator where they wanted him, was admissible, for the reason that it had some tendency to show a purpose upon the part of the former to keep the testator under their supervision and control, and exclude the other members of the family from any opportunity to interfere. This statement seems to have been made prior to the execution of the will. In Peebles v. Stevens (8 Rich. 198) it was held that where executors and legatees propounded the will for probate, their declarations, as well after as before the execution of the will, might be given in evidence by the next of kin. The court held them competent testimony, because they were from parties to the cause, and might be used by the adverse party, those making them having a joint interest and representing all the rights and interest of the testa-

trix and of her legatees. Some members of the court concurring in the result, put their decision principally upon the ground that a confederacy had been shown between the executors, and that the admission of one confederate bound the others. (See also Durant v. Ashmore, 2 Rich. 184.) In Harvey v. Anderson (12 Ga. 69) the general rule was stated to be that the declarations of a party to the record, or of one identified in interest with him therein, were, as against such party, admissible in evidence, and that this rule applied to all cases where he had any interest, whether others were joint parties on the same side with him or not, and whatever might be its relative amount. In Williamson v. Nabors (14 Ga. 286), where the admissions of an executrix and legatee of a life interest, and the proponent of the will, were held competent evidence on the trial of a caveat to that will, Starnes, J., said there was a conflict of opinion in the adjudicated cases on this subject; but held the case of Harvey v. Anderson (*above*) made the question *res adjudicata*, and that it was specially in that case reasonable that admissions by one who was executrix, who took the whole property for life, and was proponent of the will, could not have been made against this strong interest and bias for the purpose of prejudicing the legatees in remainder, or from any other motive than truth. So in Brown v. Moore (6 Yerger 272) the declarations of one of several devisees that the will had been unduly or fraudulently procured to be made, were held admissible.

In Smith v. Morgan (2 Moody & Rob. 257) it was held that the declarations of an assignee, made before his appointment as such, were competent, but Fenwick v. Thornton (M. & M. 51) is cited in Williams on Executors, as contrary to this doctrine. "It may be doubted," says the author (p. 1612), "whether admissions made by an executor or administrator before he was clothed with that character are receivable in evidence against him in an action brought by or against him, in his representative capacity."

In Clapp v. Fullerton (34 N. Y. 190) the will was propounded by the principal legatee and contested on the ground of testator's imbecility or lunacy, and of undue influence on the part of the proponent—the proponent and contestant being daughters of the deceased—it being alleged that the contestant received but an insignificant legacy, because deceased was laboring under the insane

delusion that the contestant was illegitimate. It was proved by a declaration of the proponent that this suspicion had its origin in the mind of her father nearly two years before his death, and in the interim between the execution of the instrument propounded and of a prior will. It does not appear at what period this admission of the proponent was made. It also appears that the proponent after the testator's death intimated to a witness that her mother had been too intimate with her father's brother. This testimony seems not to have been objected to, nor is the question of its admissibility discussed by the court, which affirmed the decree of the Surrogate. The evidence must have been given by the *contestant* for the purpose of showing the undue influence exercised by the proponent upon the deceased to induce him to cut off her sister, and therefore, though the evidence were improperly admitted by the Surrogate, *its admissibility could not have been considered on an appeal by the party who gave it.*

In Brick v. Brick (66 N. Y. 144) the declarations of deceased's wife, the sole legatee, made several years after the execution of the instrument propounded, were received, but the language of the opinion of Judge Rapallo, in that case is, "all these declarations were made in 1864, and there is no proof of any attempt prior to the date of the will to interfere with the intercourse between the brothers." Julke v. Adam (1 Redf. 454) was a case where the declarations of the widow of the deceased, against whom undue influence was charged, were received. The Surrogate admitted the testimony as tending to prove *an existing intent and disposition*, citing Brush v. Holland (3 Bradf. 240). In that case the contestants sought to introduce proofs of the declarations of the decedent's widow, to show incapacity and the exercise of undue influence, the widow being a legatee and executrix. The Surrogate excluded the admission as such; but as it had some bearing upon the motives and dispositions of the persons charged with procuring the will, he was unwilling to say that in that view and bearing it was entirely inadmissible. The declaration in that case by the widow of her intention to control the deceased in the making of his will, was made prior to the execution of the will. In Horn v. Pullman (10 Hun 471) [see s. c. 72 N. Y. 269 (279)] probate was contested on the ground of mental incapacity, fraud, and undue influence. The sole beneficiaries were

Mr. and Mrs. Pullman, and the Surrogate rejected the admission of Mrs. Pullman, that she thought what property the testator had when he was done with it ought to be willed to her and her husband, and that they were going to have it, too; also evidence that she said that they had got the property, and had it so fixed that if the children of deceased contested the will, they would have to pay their own cost; that they had consulted a physician beforehand to see if he was competent to make a will, and that he was a nice old man, and would do anything she asked him to. This rejection was held error.

In Dan v. Brown (4 Cow. 483) it was held that the admissions of the plaintiff or defendant, will in general affect none but himself, and not his co-plaintiff or co-defendant unless they are his partners; that in partition by several tenants in common against others, where the plea was *non tenent insimul*, the admissions of one of the plaintiffs that a will was lost could not be received to affect his co-plaintiff, and that the confessions of one tenant in common of lands, is not evidence against his co-tenant.

In Hammon v. Huntley (4 Cow. 493) it was held that confession by an executor of a debt due from his testator is not admissible as evidence in a suit for debt against his co-executor to establish the original demand. (And see James v. Hackley, 16 Johns. 273; Whitney v. Ferris, 10 Id. 66; Forsyth v. Ganson, 5 Wend. 558; Osgood v. Manhattan Co., 3 Cow. 612.)

In Bovard v. Wallace (4 Sergt. & Rawle 499), which was a feigned issue to try the validity of a will, the defendants offered to prove that one of the devisees had declared that the testator, at the time of executing that writing, was incapable of making a will, which evidence was excluded as incompetent, and the ruling sustained on appeal. And in Nussear v. Arnold (13 S. & R. 323), the declarations of the principal devisee that the testator was incapable of making a will were received in evidence; but on appeal the exception taken to the evidence was sustained.

The same rule was followed in Hauberger v. Root (6 Watts & Serg. 431; Dietrich v. Dietrich, 4 Watts 167; Boyd v. Ebly, 8 Watts 66; Clark v. Morrison, 25 Penn. St. 453; Titlow v. Titlow, 54 Id. 216; Dotts v. Feltzer, 9 Id. 88). The rule in Massachusetts is the same, it being held that devisees and legatees have not that joint interest in the will which will make the admis-

sions of one, though he be a party to the record, admissible against the other legatees. (Shailer v. Bumstead, 99 Mass. 112 [given *ante*]; and in Alabama, Blakey v. Blakey, 33 Ala. 611; and in West Virginia, Forney v. Ferrell, 4 West Va. 729; and in Ohio, Thompson v. Thompson, 13 Ohio St. 356; and in Georgia, Morris v. Stokes, 21 Ga. 552.) The reasoning and result of the last case go far towards overruling the earlier Georgia case above referred to—certainly as applicable to the case under consideration.

I think it must be conceded in this case that the will in question must stand or fall in all its provisions, and that there is neither in the proof offered or the allegations filed, on the theory of either of the counsel, any warrant for the suggestion that it may be admitted to probate as to one or more of its provisions, and be rejected as to any of the others. Indeed, I understand this view to have been acquiesced in by all the learned counsel in this case, where the admissibility of proof tending to show undue influence exercised upon the mind of the testator against his son Cornelius J., though not a contestant, was under consideration. For the purpose of the admissibility of the declarations of a legatee, after the execution of the instrument propounded, it must be admitted that they would affect the will as a whole, and the interest of the respective legatees alike.

As the question submitted is one of great importance in this case, and of general interest in probate cases, and has been argued with great earnestness and ability by the learned counsel for the respective parties, I have deemed it my duty, especially as the authorities directly upon the point are so few in this State, to thoroughly examine each case cited by counsel, and such as my own researches have enabled me to find, together with the elementary treatises upon the subject, as this case in its ultimate result will be likely to settle the question for the future.

It seems to me that the weight of authority is against the admissibility of the declarations of one party to affect the rights of another, unless such parties be jointly interested, by which each party is authorized to speak and act for the whole, or there is proof of a combination, in which case a conspirator may speak for all his confederates. But in the latter case, a conspirator, by his admissions or declarations, can only affect his co-conspirators, and if his admissions or declarations cannot but affect other

parties not confederated, such admissions and declarations should be excluded. This rule is based upon the most obvious principles of justice. Is there any good reason to be suggested why the rights of one party should be affected by the irresponsible admissions of another party, with whom he chances to be associated as such, but upon whom he has conferred no authority to speak for him?

Such a principle would enable a party to deprive another of his legal rights, without that other being able either to disprove the admissions, or by cross-examination to test their truth. It is true that the admissions of a party adverse to his interests are held admissible because of the improbability of a person admitting a fact contrary to his interest unless such admission be true, and there seems to be a propriety in holding such a party bound by his own admissions, but when the interests of another party intervene, that other party has the right to insist that they shall not be divested except by the ordinary proof attested by the sanction of an oath, or by his own voluntary admissions.

In his capacity of executor, the residuary legatee represents with the other executors all the devisees and legatees, and not himself alone, and they have the right in that representative capacity to object to the admissions made by one legatee to affect all the others.

If the testator, the origin and source of the testamentary bounty, cannot, after the execution of his will, admit away the rights of the beneficiaries or impair the validity of the testament by such admissions, upon what principle can one beneficiary be permitted to impair or destroy the rights of his co-beneficiaries, who derive nothing of those rights from or through him?

Suppose the legatees of the will in question who are neither heirs nor next-of-kin, had declared that they unduly influenced the deceased to make such will in favor of William H. Vanderbilt, can it be that the other legatees are to be deprived of their legacies upon such admissions? And yet they are parties in interest, represented by the executors. If the doctrine obtain that a party who admits a fact adverse to his interest may affect the rights of all other parties, it would extend the principle to any legatees, however insignificant their legacies. A fact might thus be adjudged which would deprive all the other legatees of their

legacies, upon the irresponsible admission of some, whom they had clothed with no authority to speak for them or to intervene in respect to their rights. I say irresponsible, because the legatees making the admissions could not be held liable, although their admissions were false. As to the other parties who had no responsibility respecting the admissions, such admissions would obviously be hearsay.

Suppose a legatee, for some fraudulent or revengeful purpose, or pursuant to some corrupt combination with the contestants, should make admissions adverse to the probate of the will, would it be just that the rights of innocent parties should be thus impaired or destroyed, without the power of redress?

It may be answered that *witnesses*, when examined under oath upon the stand, may swear falsely, and may have entered into fraudulent schemes to destroy the rights of other parties, under the subornation of an adverse party; but in such a case the witnesses would be deterred by the terrors and penalties of the criminal law against perjury, as well as by the admonition of their consciences, and the principal of the penalties of the law against subornation of perjury. Besides, such witnesses would be confronted by courts, parties and counsel and by public observation, and the aggrieved parties would not only be afforded the opportunity to inquire as to all the circumstances on cross-examination, as a test of the truth of the testimony, showing the manner and conduct of the witnesses for the scrutiny of the court (an almost infallible test of truth), but to impeach the general character of such witnesses for truth and honesty.

Upon well-recognized and elementary principles and the highest considerations of justice, as well as the weight of authority, I am convinced that the various admissions and declarations of the executor and legatee offered by the contestant are inadmissible and should be excluded.

[Also Matter of Baird, 47 Hun 77; Wms. on Exrs. (Perkins' Am. ed.) 360, note (*m*), citing numerous cases; Shailer v. Bumstead, given *ante*. The admissions of a *sole* beneficiary are competent. Wms. on Exrs. (Perkins' ed.) 360, note (*m*) and cases cited.]

UNDUE INFLUENCE.—INTERNAL EVIDENCE.—DECLARATIONS.

Harrel, &c. vs. Harrel, &c.

KENTUCKY COURT OF APPEALS, 1864.

(1 Ky. 208.)

Judge *Robertson* delivered the opinion of the court:

A paper purporting to be the last will of William Harrel, deceased, after probate in the county court of Daviess, was, on an appeal to the circuit court, set aside by the verdict of a jury and the judgment of that court. From that judgment the propounders of the will appeal to this court.

When he acknowledged the testamentary document, the decedent, about seventy years old, was confined to his bed by an inflammatory disease, which appeared very distressing, and made him frequently both "drowsy" and "flighty," and of which he died about two days after the attestation.

At his death he owned the homestead tract of land, worth $10,000; ten slaves, valued at $4,000; stock worth $1,125; other personalty, estimated at $1,673; and $682 cash in hand; and there is no proof that he owed any debts. He left four children and some grandchildren, none of whom (children or grandchildren) had been advanced by him.

The testamentary provisions are simple and short; and give to his widow, whom he married not more than eight years before, and to his son James, his whole estate of every kind during her life, remainder to said James, excepting only the slaves, which were to be equally divided between James and his brother Jonathan, sisters Hannah Humphrey and Mary Ann Patrick, and the children of a deceased sister, Lydia Beard.

For such gross inequality no reason is suggested in the document itself or by the proof on the trial. The testator had an unquestionable power to make such a will. But its apparent unreasonableness requires satisfactory evidence that it was the free and deliberate offspring of a rational, self-poised, and clearly disposing mind. And all this has not, in our opinion, been shown by the testimony with sufficient assurance.

No witness expressed the opinion that he had not a disposing mind, and the subscribing witnesses, and most others, testified to

some facts conducing to the abstract conclusion that he had. But all of them prove other facts, conflicting, in a greater or less degree, with that conclusion; and these we will summarily notice in two classes—1st. As illustrative of incapacity; and, 2d. As indicative of extraneous influence controlling his enfeebled and disturbed mind.

1. He was often in a state of stupor, and, when roused, was generally flighty; but soon, while awake, became apparently rational. He dictated the substance of the legatory provisions as written. But he became comatose while the draftsman was writing, and though soon awakened to apparent self-possession and reason, yet a watcher attended to his pulse so as to announce whether and when the pulsations should indicate an incapacitating perturbation of mind.

2. His second and surviving wife—no mother of any child of his, often teased him to make a will. These annoying importunities were repeated from a short time after their marriage to a few weeks before he was struck down by the fatal sickness. He always resisted these overt and reiterated solicitations, and, on one occasion, she said that "the old devil" would not do as she wished. From such proof of open solicitations, there can be no doubt that secret appeals, more frequent and urgent, were continued in various ways, and it is not improbable that her selfish perseverance succeeded, at last, in bowing his stubborn neck to her yoke when feeble and hopeless on his death-bed. The proof is clear that he often, for years, declared that the law made the best will, and that he would never make one. He also said, not long before his death, that he desired an equal distribution of his estate among his children; and, not more than three weeks before his death, declared that he would never make a will. In confirmation of that as his fixed sentiment, he, by extraordinary remonstrances, prevailed on one of his sons to die intestate.

Now, what changed that settled purpose, for the first time, when he was expecting to die every hour, and was scarcely able to think deliberately or exercise a prudent volition? The record affords no clue to a consistent answer, unless his wife's influence, aided, perhaps, by the co-operation of his son James, finally subjected his will and changed his long-cherished purpose of intestacy and legal equality. And, considering all the facts, the presump-

tion is strong that this was the controlling cause. In the disturbed and flitting condition of his mind, the impress of that influence and dictation might have enabled him mechanically to dictate the devise to his wife and son James, of his whole estate without classifying it or enumerating the articles. And this is rather confirmed by the proof that he did not suggest, but seemed to pretermit, the ulterior provision as to the slaves until his attention was called to that subject.

Whilst, therefore, the testamentary right should be carefully guarded and faithfully vindicated, this court should be vigilant to prevent, as far as it can, the abuse of that right by withholding its approving seal from a document, so unnatural and so questionable as to freedom and capacity, as that now under its final consideration. To establish it as a valid will would encourage a prostitution of the testamentary power. To reject it would increase the value of that power, and tend to frustrate improper intermeddling, and especially *in extremis*, to disturb the just equality of the law.

In a case of such unaccountable inequality, justice and policy require clear and satisfactory proof of a free, deliberate, and disposing mind, before such a paper, as that now before us, shall be established by our judgment as a true and valid will. We cannot feel that we have that proof. On the contrary, we are strongly inclined to the deduction that the document was not the spontaneous and legitimate offspring of a self-poised, settled, and disposing mind. And this conclusion, were it more doubtful than it is, might be made preponderant by the verdict of a jury of neighbors confirmed by the judgment of the circuit court.

Wherefore, this court adjudges that the document in question is not the will of William Harrel, and remands the case to the circuit court, with instructions to enter this judgment and certify it to the county court of Daviess, to be recorded as the judgment of that court.

UNDUE INFLUENCE.—TESTATOR'S RELATIONS WITH LEGATEE.

Carpenter v. Hatch et al.

NEW HAMPSHIRE SUPREME COURT, 1888.

(64 N. H. 578.)

Carpenter, J.—The testimony that Kendall, when he lived in Tyngsborough, attended the church of which Mial Davis, the

father of one legatee and grandfather of another, was a deacon, and sat in the pew with him and his family, and that he acted as guardian for the grandson, was competent for the purpose of showing the testator's relations to the Davis legatees, and affording a reason for his manifestation of interest in them. It was open to the defendants to argue to the jury that legacies to strangers indicated an unbalanced mind, and it was proper for the plaintiff to show that the legatees were not strangers. There is no foundation for the objection that the evidence touching Kendall's acting as guardian was secondary. No attempt was made to show that he was a legal guardian. The plaintiff was not precluded by the fact that he was not in law a guardian from showing that in fact he took charge of and cared for the boy and his property as a guardian would. The declarations of Diantha and Charles W. Carpenter against their interest as legatees under the will were incompetent; they were not parties to the suit. Atkins v. Sanger, 1 Pick. 192; Shailer v. Bumstead, 99 Mass. 112, 128, 129 [given *ante*]. The question put to Ednah Hatch, asking what her deceased husband said was the amount of the testator's securities, was properly excluded as calling for mere hearsay. His decease did not make his declarations competent. The act of examining the securities and computing their amount was immaterial, and his statement was not admissible as a part of the *res gestae*. Morrill v. Foster, 32 N. H. 358, 360; Ordway v. Sanders, 58 N. H. 132. The opinion of Emma L. Carpenter that the testator was of sound mind was admissible. Hardy v. Merrill, 56 N. H. 227. Whether she was qualified to give an opinion was a question of fact for the trial court. Jones v. Tucker, 41 N. H. 546; Bundy v. Hyde, 50 N. H. 116. The will itself was evidence tending to show that the testator, when he executed it, was informed of the amount and character of his property. The evidence that in November, 1885, he was fully cognizant of the amount and character of his property, had some tendency, and, if he remained in possession of his faculties, a strong tendency, to show that he had the same knowledge a few months later, when he executed the will and codicil. There was no presumption of law or fact that Mason A. Carpenter controlled the testator's mind, and that the codicil was invalid for that reason. State v. Hodge, 50 N. H. 510; Bank v. Getchell, 59 N. H. 281. Whether he did or did

not control or improperly influence the testator was a question of fact for the determination of the jury upon all the evidence, including his relations to the testator, his acts and conduct in respect to the making of the will and codicil, and the benefit he derives from them. It was submitted to the jury with proper instructions. Lord v. Lord, 58 N. H. 7, 11. The instructions asked by the defendants in their third request were given. It was not necessary that the court should adopt the defendant's precise language. Other exceptions not urged in the argument have not been overlooked. Judgment on the verdict.

Smith, J., did not sit. The others concurred.

UNDUE INFLUENCE.—EVIDENCE.

Tyler v. Gardiner.

NEW YORK COURT OF APPEALS, 1866.

(35 N. Y. 559.)

Porter, J.—There is an almost wearisome monotony in the conformity of the facts developed on the hearing, with the familiar and recognized *indicia* of contrivance and undue influence. There are few of the reported cases, in which wills have been condemned, presenting such a concurrence of circumstances unfavorable to the establishment of the instrument. If they were susceptible of contradiction or explanation, the sources of proof were abundant. The respondent was a competent witness. Most of the material facts were within her personal knowledge. She was a prominent actor in all that related to the will, and in the series of transactions which led to so complete a revolution of intention on the part of the testatrix. She was surrounded by a numerous household; the important events were of recent occurrence, and they transpired at her own residence. When we find the party, whose right and interest it was to countervail the force of the facts by evidence, content to leave them unrebutted and unexplained, and to abide by the conclusions to which they so clearly tend, we have nothing to do but to draw the inevitable inference, and, applying the settled rules of law, to sustain the rejection of the will. It may be that the whole truth of the case is not before us; that facts exist, which, if proved, would relieve

it from some of its unfavorable aspects; but we are bound to take the evidence as we find it, and to give it effect in accordance with our clear convictions.

It will facilitate a consideration of the legal questions involved, to precede it with a condensed analysis of the more material facts, grouped with reference, not merely to the order of time, but also to their mutual dependence and relation.

The property of the testatrix was mainly derived from her children, by voluntary and equal gift of their shares in their paternal inheritance. That her ultimate estate came to be so considerable, was mainly due to the fidelity and care of her son David, who relinquished a profitable business, at the age of thirty-three, to assume the management of her property; who devoted himself faithfully to the object, without recompense, until he was forty-six years old; and who was then ignominiously dismissed by his mother, without cause, through the active and controlling influence of a younger sister, who had recently become a member of the household. He had been educated to a profession which he had never practiced; had married, when he had just expectations of a liberal provision from his mother's estate; and, so far as the evidence discloses, he had, at no time, been wanting in filial duty or affection, or received from her a mark of displeasure or unkindness down to the hour when, by a letter written by her, corrected by his sister, and delivered by a messenger, all being under the same roof, he was suddenly ordered to leave her house.

Harry Beeckman was an orphan boy of thirteen; an inmate of the family, and dependent upon the bounty of his grandmother, only because she had been the donee of his mother's inheritance.

Mrs. Tyler was the only member of the family, who, independent of the testatrix, had a large property in her own right. She left her father's house the year he died, and returned home at a time when her mother bore the fatal marks of organic diseases, which, within a twelvemonth, resulted in death. The daughter had been favored by circumstances gratifying to a mother's pride and giving prestige to her name. She was a lady of intelligence and culture; her manners were engaging and attractive; she wrote with facility and grace; she was assiduous in her attentions to her

mother, and soon brought her to feel, as she declared in one of her letters, a copy of which was preserved and produced by Mrs. Tyler on the hearing, not only that the society of her daughter was agreeable to her, but that she needed her "sympathy and assistance." This needful sympathy and assistance do not seem to have been withheld; and from the time of the daughter's arrival, their views became more and more concurrent, until they entirely harmonized. The influence of Mrs. Tyler soon became apparent in the family, and in all matters of importance it seems to have been uniformly effective and controlling. She had seasonably notified her brother in advance that she intended to return, and that he must seek other quarters for himself, his wife, and his children. To the latter proposition he did not accede, and his answer, referring that question to his mother, in co-operation with other causes, seems to have produced toward him a feeling of unkindness on her part, in which, soon after she became an inmate of the house, her mother was brought to sympathize. It is true that, when the request to the latter to send David away was preferred, in the first instance by one of Mrs. Tyler's children, she promptly refused to comply, on the ground that he was her child; but this objection was readily overcome, and she was soon afterward induced to yield to the request, and to dispatch a letter to the son, in which this parental relation seems to have been entirely overlooked. Indeed, in the subsequent letters, the existence of this involuntary family tie is alluded to in terms which indicate an impression on her part that it was a matter of condescension to acknowledge it, even for the purpose of invidious comparison between him and her daughter.

In the brief period which intervened between the return of the sister and the expulsion of the brother, the mother was brought into a state of singular and causeless alarm as to the condition and safety of her property, and she was led, in the subsequent letters, of which Mrs. Tyler's memoranda were produced on the hearing, to overwhelm him with groundless imputations of malfeasance, deception, and fraud, in the performance of his duties as her gratuitous agent, and in the management of her perplexing and diversified business affairs. She was also, in some way, made to believe that he had been guilty of "some fearful proceedings" to his sister, of which the servants in the family had been eye-wit-

nesses. Her letter shows that the servants were not her informants, and it is obvious that the reproach was wholly unmerited, as there is not a shadow of foundation for it in the evidence.

The proof leaves no room for doubt that these later letters were written with the privity of the sister, if not transcribed from her so-called memoranda. The fact is undisputed that, during most of the brief period in which these false impressions were imbibed, the mother was a confined and suffering invalid; that the son was engaged, as usual, in the management of her general business; that she was in the closest intercourse, if not under the immediate influence, of Mrs. Tyler, who was most of the time in her room; and that the latter was the only party interested in alienating the mother from the son, and the only party benefited by the testamentary changes, which she introduced these letters to explain. That her influence over her mother was active and controlling is apparent, not only from the ultimate acquiescence of the latter in her views, which were contrary to those she had previously entertained, but, also, from the significant circumstance that, though the son repeatedly called at the house of his mother, and continued to do so down to the month of May, he never found his way to her presence; that she then left home, and remained through the summer at a private boarding-house in New York, Mrs. Tyler visiting her there almost daily; and that, on her return to Castleton, and the near approach of death, though the lawyer and doctor were promptly summoned, no message was sent to her only son. So far as we have the means of judging from these facts, from the memoranda produced by Mrs. Tyler, and from the singular provisions of the will, Mrs. Gardiner retained, to the hour of death, the false impression that David had deceived and defrauded her, and that he had been guilty of wrongs to his sister, too fearful to be spoken of either by him or the testatrix.

That will was made on her death-bed, in the presence and by the procurement of her daughter, and in the absence of her son and grandson. Her clergyman opportunely called on his dying parishioner. He was excluded by the testatrix, but the execution of the will was not suspended. She had never exchanged a word on the subject with the draughtsman of the instrument until the day of her death. She referred him to Mrs. Tyler, as the party

from whom he was to take his instructions; and her inquiry on that subject shows that she did not know whether they were written or oral. She complied, however, as well as she could, with his request for personal instructions, and answered such inquiries as he felt it his duty to make. Mr. Clark had, in fact, been previously furnished with full written instructions, sent to him the day before by Mrs. Tyler, with a note bearing date three days prior to the execution of the will. They were in the handwriting of the daughter, and were of a nature which could scarcely fail to excite the surprise of one who knew the testatrix, and the situation and relations of the family. He declined to comply with Mrs. Tyler's request that he should reduce them to form, without confirmation by personal instructions from the testatrix. Though his call was on the evening first named in Mrs. Tyler's note, as that on which she wished him to bring the will for execution, she intimated that the interview he proposed with her mother would be inconvenient at that time, and deferred it until the following morning. She alone was present when that interview occurred. The inquiries made by Mr. Clark were those suggested to his mind by her written instructions. He made an appointment for the execution of the will at five o'clock in the afternoon. Before noon Mrs. Tyler sent a messenger to his office to expedite the preparation of the instrument, and to have it brought in haste for execution. She provided the attesting witnesses; was present at the reading and signing; and rendered such assistance as the prostrate condition of her mother required.

On the day when these occurrences transpired, Mrs. Gardiner was exhausted, vomiting, weak, signifying her wishes and assent, sometimes by words and sometimes by nods. The gentleman who drew the will conducted the matter with great propriety, and, perhaps, with more scrupulous caution than was entirely agreeable, either to the mother or to the daughter. He seemed impressed with the idea that the provisions he was directed to insert called for some explanation. He pushed his inquiries as far as he could, without apparent incivility. In relation to the gift by the testatrix to her son, of certain claims and advances, he ascertained that they rested on no written evidence, and that she could give him no specific information; but the general result of his interviews with the mother and daughter was to leave him

under the mistaken impression that such claims really existed. The idea that Mrs. Gardiner had made advances toward the purchase of David's farm, seems never to have been suggested in any quarter, until it appeared in Mrs. Tyler's instructions. The mother, of course, knew that she had never made any such advances; and it is difficult to resist the conclusion that she was made to believe that her son had bought the farm with money embezzled from her. The insertion of the provision, utterly groundless as it was, could serve no practical purpose, except to give to the will a seeming color of equality. Mr. Clark, also, very properly, deemed it his duty to inquire as to the prospect of the restitution by the government to Mrs. Tyler, which was to be the condition of the enjoyment by David Gardiner of his inheritance. Neither of the ladies seemed able to furnish any information on this point. That the idea originated with Mrs. Tyler is shown, not only by the written instructions, but also by the direct and affirmative evidence of one of the subscribing witnesses. Mr. Clark felt bound also to inquire as to the grounds on which she expected to obtain further damages against the city of New York, in addition to those already awarded her, for opening certain streets. Having been her attorney and counsel in that matter, he, of course, recognized the absurdity of such a claim. She replied with a vague intimation that she had been assured by her friends that she could obtain such additional damages. Who these friends were, does not appear, otherwise than by inference. Her son had advised her that such a suit would be hopeless; and the only person by whom it seems to have been regarded with favor was Mrs. Tyler, who made it the staple of one of her instructions, and certified the claim to be just. She probably so supposed, as she directed the insertion of the bequest in the will; but, in the light of the evidence, it was valueless, except as evincing a recognition of the propriety of introducing one provision into the instrument, in which there should be some regard to apparent equality in distribution.

The testatrix made the will under false impressions, as to the relative circumstances of her son and daughter. She had enlarged on the poverty of the latter, in conversation during the summer, with the two ladies who were called by the respondent in support of the will. She talked to Mrs. Stryker in relation to Mrs. Tyler

and "*the destruction of her property.*" She told Miss Cooper that "*Julia was poor*"; and added: "Don't think that I don't care for David, but I must take care of Julia." Mrs. Tyler, in her instructions, speaks of "the losses of property she has sustained," omitting, of course, any reference to the property she had not lost, which she, perhaps, thought inappropriate in that connection, though it is alluded to in general terms in the will afterward prepared by Mr. Clark; and Mr. Dayton, the tutor of her children, had previously heard her talking to her mother about her losses. Mrs. Gardiner, herself, seemed to feel the necessity of some apology to Mr. Clark for the singular provisions of the instrument; and his attention was arrested by the circumstance, that, at the first of the two death-bed interviews, notwithstanding her distress and difficulty of articulation, "she talked for some moments about her daughter having lost her property, and her desire to provide for her, and that she trusted the others would acquiesce in it cheerfully." The apology was inserted in the will, and is the only material provision in the instrument not traceable to Mrs. Tyler's written instructions. It is difficult to attribute to any other rational cause, than Mrs. Gardiner's sense of the injustice of the will, her objection to its being read in the presence of her physician, who was to attest it; her injunction of secrecy when Mr. Clark told her that, though the precaution was not usual, he preferred that the doctor should be present when he read it; and her refusal to admit her clergyman, who happened to call as she was about to affix her signature.

Mrs. Gardiner had, undoubtedly, testable capacity at the time the instrument was executed, but she was in a condition to be peculiarly exposed to the exercise of undue influence. Until she became an invalid, she was a lady of fair intelligence, unfamiliar with business, of an affectionate and yielding disposition, fond of attention and deference, and not unconscious of the consideration to which she was entitled, in virtue of her property and position. She was more credulous than most of her sex, and repeated, from time to time, to her female friends, spiritual communications, which she supposed she had received at successive intervals from her deceased husband, son, and daughter. In the later years of her life she was a severe sufferer from disease. When her daughter came home, in November, 1863, she was feeble and emaciated, and

during the winter she was mostly confined, not only to her house, but to her room.

The daughter was in the prime of life. The mother was infirm of purpose, sick and old. She was soon imbued with false impressions, and brought to a condition of nervous and causeless suspicion and alarm. She expelled her son from her house, and never saw him afterward. Her subsequent communications with him were very few, very bitter, and all in writing. The letter of the 10th of February, directing him to leave, was, undoubtedly, composed by her, though corrected, if not prompted, by her daughter. It bears upon its face the evidence that she was not an easy and practical writer. The letter of the 9th of March, and those which followed it, are in a very different style. If they were designed for future use, as evidence furnished by her, of the truth of the groundless accusations with which they abound, they were well framed for such a purpose. If they were intended to repel all possible explanation, and to cut off even the hope of any future reconciliation, they were couched in terms appropriate to that end. If they were really composed by her, it is quite apparent that, in the month which intervened between her first and second letter, she had made unexampled progress in her literary acquirements, observable alike in her style, her punctuation, and her accuracy in the use of language. They are marked, however, by no diminution of bitterness, and no observance of the usual forms of courtesy, except that when the daughter is referred to, she is spoken of in terms of almost extravagant encomium and deference. Whether the son was right in his conviction as to their authorship, to which he testified on the hearing, is only matter of inference from the production of the so-called memoranda, not shown to be in the handwriting of the mother, and from the omission of any denial by his sister, to whom he imputed the dictation of the letters.

That the death-bed disposition, by Mrs. Gardiner, of her property, was entirely opposed to her former deliberate purposes, and her convictions of equity and justice, before her faculties were impaired by disease and infirmity, is indisputably established by the will of 1858.

She was then fifty-nine years of age, and in perfect health. Her son had the same property at that time which he had at the date of the will of 1864, consisting of a farm, mortgaged for the entire

purchase-money, except the $5,000 paid from his earnings in California. Her property was the same in 1858 as in 1864, except so far as its value had been augmented in the interval under his charge, and through his continued services and supervision. Her grandson, Harry Beeckman, was, at both dates, an inmate of her family, and nothing had occurred in the six years intervening to alienate the affections of the testatrix, or to add to his means or expectations.

Mrs. Tyler, at the date of the first will, was dependent on such provision as her husband might make for her, in case she survived him. When the last was made, she had a considerable estate in her own right.

By the original will, the testatrix gave the twelve acres on which she lived, and the movables thereon, to her son. The place was subject to the Roosevelt mortgage, the payment of which was not charged on the residuary devisees, as it was in the subsequent will, when it was given to Mrs. Tyler. All the residue of her property, she gave, in equal shares, to her son, her daughter, and her grandson.

The contrast between the two instruments is striking. The first makes precisely such a disposition of her property as her children would naturally expect, in view of the sources from which it was derived, the services of the son by whose care it had been preserved and augmented, and the common claims of affection and of blood. If she ever had made any advances toward the purchase of David's farm, she knew it then; for he had bought it five years before, and all that he paid toward the price was paid at that time. If she disapproved the mode in which he transacted her business, she knew it then; for he had transacted it through the preceding seven years, in the same mode, which was continued to the year of her death. If he had then rendered services worthy of special recognition in her will, the force of the claim was not diminished by six more years of similar service without recompense.

In view of all these circumstances, it is difficult to resist the conclusion that the death-bed will of 1864 was the result of the same controlling influence which led, a few months before, to the expulsion of the son from his mother's house. In the light of the surrounding and antecedent facts, the testamentary instrument carries with it its own condemnation.

The precise case is presented, in which we are legally bound to compare the provisions of the two wills. (Delafield v. Parish, 25 N. Y. 35; Marsh v. Tyrrell, 2 Haggard 87, 110.) In the first of these cases, a leading and controlling ground of the decision was, the hostility of the provisions of a codicil, executed by a testator in a condition of helplessness which exposed him to undue influence, to those of an antecedent will, made when he was in health, evincing deliberation and care, and free from all suspicion. The case of Marsh v. Tyrrell, which this court has repeatedly had occasion to approve, was one where the husband was the principal beneficiary under a will made by his wife, under circumstances, in many respects, similar to those which concur in the case at bar. In pronouncing the judgment of the court, Sir JOHN NICHOLL said: "In inquiring, then, into the *factum* of the latter will, it becomes material to examine the probability of this great change of intention, and it becomes the more necessary, if, at the time of making the disposition, the capacity was, in any degree, weakened or doubtful; still more, if the husband, in whose favor this great change is made, and who, from the relation in which he stands to the deceased, must almost necessarily have great influence and authority, should be the person originating and conducting the whole business of the new will. To examine, then, the probability of this change, it may be proper to consider the grounds and circumstances of making the first will. If they were made upon hasty, capricious, temporary considerations, the departure from it becomes less improbable; but, if made under motives long existing, and quite naturally inducing it, the adherence to it will be the more strongly presumed, and the circumstances to account for the complete revolution in her intentions will be required to be more forcible." After reviewing the particular facts, he adds: "If, then, in addition to these circumstances, first, that the disposition in the new will is highly improbable; next, that the husband had been endeavoring to get at her deeds and testamentary instruments; and further, that she was in this state of doubtful capacity; if, in addition to all this, we find that the husband, as far as the evidence goes, originates and conducts the whole business, representing, or rather misrepresenting, the previous facts, and being present at all the material parts of the transaction, the case proceeds to the evidence of the factum under presumptions of fraud and imposition,

which hardly any evidence would be sufficient to repel. It would, at least, be extremely difficult to show that she was a free, as well as a capable, testatrix; to show that she had a real, disposing, testamentary mind, and an intention to abandon all the dispositions of her former will, made so carefully and adhered to so firmly. The strong presumption would be, that, in whatever she said and did, however it might impose upon the witnesses, she was a mere instrument in the hands of her husband."

In the leading case of Blewitt v. Blewitt, the issue was as to the execution of a will, made in feeble health, by a testator sixty-nine years of age, and under circumstances which exposed him to undue influence, by a lady, who had strong claims upon his justice as well as his bounty. That case, like this, presented unfavorable features peculiar to itself; but, among those common to both, were the weakness and exhaustion of the party; the entire departure from previous testamentary dispositions; the false impressions under which the will was made; the active agency of the beneficiary in procuring it to be drawn; her presence at the testamentary act, and the absence of those who had, at least, equal claims upon the justice of the testator. The eminent jurist, by whom the opinion was delivered, after alluding to the force of the presumptions against the instrument from its hostility to previous testamentary provisions, proceeds to say: "It is difficult to conceive a case in which that presumption would exist with more force than in the present, looking to the former wills, to the condition of the deceased, to the parties in whose favor the codicil was to be made being at the time about the deceased, and to the absence of other parties, to whose prejudice these alterations were to operate. In such a case, the fullest proof of capacity, equal, not merely to some testamentary act, but to this important revocation of former dispositions, and to a new direction, given to a large portion of his property, should be clearly established; and, in this instance, the condition of the deceased, the possession of him by the parties to be benefited, and the false impressions made upon his mind, have, also, a strong appearance of fraudulent circumvention, requiring the case to be proved by the most satisfactory evidence." (4 Haggard, 463.)

The application of this recognized legal test to the present will, upon the state of facts disclosed by the evidence, raises a strong

presumption of undue influence, which the proponent's proof wholly fails to repel. The original will, undoubtedly, expressed the intelligent and deliberate purposes of the testatrix. The disposition which it made of her property was, obviously, equitable, rational, and just. Its language is simple and direct. The reader is not left in doubt as to the purpose or the motives of the testatrix. It contains no false suggestions, no substantial gifts to one, in the form of seeming gifts to another, no apology for its own provisions, and no admonition to filial acquiescence in parental injustice. It commits the charge of the grandson's estate, during the period of nonage, to the son, who had so faithfully and successfully managed her own, and it does not name a stranger as executor, to the exclusion of her own family. So far as the evidence shows, this instrument, executed in July, 1858, was in existence in May, 1864, and remained, as an authentic and unrevoked expression of her deliberate will, until the very day of her death.

The subsequent will bears upon its face the marks of indirection, as well as of singular contrivance and forethought. It contains peculiar and unusual provisions. It locks up the property devised to the son, and commits the key to the custody of his younger sister, whose hostility was well known to the testatrix. It anticipates and provides for the unusual contingency of a possible removal of either the son or the daughter out of the United States; and, to guard against any fraud upon the intent of the provision, it adds that such removal must be for a permanent residence. The gift of the homestead to the daughter is simple and absolute. The gift of the residue of the estate, real and personal, is trammeled with five "*express conditions*"; and it will be seen that they were conditions which could not be complied with, except by such of the devisees as might be fortunate enough to have ample means for that purpose at their command. A novel penalty is imposed upon the son for supposed misconduct of the federal government, in respect to which no blame is imputed to him. The entire income of the share, of which he is the ostensible devisee, is given for life to his sister, to her own use and benefit, *unless* the damages which she is alleged to have sustained on her James River property, and her Point Comfort property, be reimbursed by the federal government; but the theory of reimburse-

ment is not to be extended to her. She is, from that time, to receive his income no longer, but what she has theretofore received she is to retain in her own right.

Reading the will in the light of the evidence, we find that, by the changes it effects in the testamentary dispositions, a large share of the inheritance, which would otherwise have gone to the grandson, is transferred to the daughter, who is substituted as trustee in place of the son, and she is to receive his income during his minority, and to apply so much of it as may be necessary to his maintenance, education, and support. The devise to the grandson is fettered with a limitation over to her and her brother; in case either of his death before he reaches the age of twenty-one, whether with or without children, or of his death afterward, without children, whether he die married or unmarried. It is scarcely necessary to add, that there was no such provision in the original will, and that it had its origin in a special clause in Mrs. Tyler's written instructions. In the light of the evidence, it also becomes manifest that, of six principal clauses in the will, three have no practical operation or apparent purpose, unless by way of palliation or apology for the provisions of the other three. It is due to the draughtsman to bear in mind that the limitation to the term of Mrs. Tyler's life, of the gift to her of the income of her brother, was a departure from her instructions, and was only assented to by the mother, on his suggestion that in the original form it would be illegal.

A still more striking illustration of the diplomatic indirection which marks the will, is found in the clause charging, personally, upon the residuary devisees, the payment of all the debts of the testatrix. Even if we dismiss from our view the undisputed fact, that she held the bulk of the property by free gift from her children, it is not easy to believe that a mother, with an intelligent comprehension of the effect of such a provision, would personally charge her only son with the payment of three-eighths of her mortgages, and other debts, amounting to nearly $50,000, knowing that his property consisted only of a small farm, mortgaged for the greater portion of the purchase-money; that, by another provision of her will, he was cut off, in all human probability for life, from the income of his inheritance; and that, by an additional clause, she had prohibited any partition or sale of the property devised, without

his sister's consent, unless on the condition of becoming a voluntary exile from his country. It is equally difficult to suppose that the effect of the provision was *not* comprehended by the writer of the instructions, who, originally, proposed to make it still more stringent by directing the payment of such debts, whether principal or interest, "*as they fall due*"; a clause so unreasonable, under the circumstances, that the draughtsman took the responsibility of omitting it in preparing the will for execution. The payment, however, of three-eighths of these debts is made an "express condition" of the ultimate benefit of the devise to the son, after the death of the sister. So far as the proof enables us to judge, he was without the means to make such payment. The property nominally devised to him was so locked up, in pursuance of Mrs. Tyler's instructions, that he could not raise the amount either by sale or by mortgage of his interest; and the practical effect would be, in the ordinary course, a forced sale of the property, Mrs. Tyler being the only member of the family whose private fortune would enable her to become the purchaser; and who, irrespective of this resource, was provided with ample means, under the express provisions of the will. It is incredible that the mother could have had an intelligent and deliberate purpose to put her son so completely in the power of a sister, who entertained unfriendly feelings toward him, and who was not merely succeeding to the principal portion of his birthright, but succeeding to it through a title derived from him, by free gift. Such a purpose, on the part of the mother, would have been, not only ungrateful, but unnatural. If it originated, however, with the daughter, there was much to palliate it. Her relations to her brother were not such as to lead her to appreciate its injustice. She was under no special obligation to him; and it was natural for her to feel that her own interests, and those of her children, were those in which she was most nearly concerned. She had the right to exercise the influence springing from family ties, services, affection, or gratitude, to the extent even of importunity, without subjecting herself to just censure or reproach. So, in regard to the orphan son of her dead sister, it was very natural for Mrs. Tyler to feel that she had a stronger claim to inherit his estate, than his future wife, or his children born before he arrived at the age of twenty-one; but it is impossible to believe that Mrs.

Gardiner, in disposing, at her own death, of a property, for a large part of which she was indebted to the bounty of a deceased daughter, could, seriously, think it right to tie it up in the hands of that daughter's only son, to fetter his power of alienation, either by deed or by will, and to affix a limitation for the benefit of her own heirs, to the exclusion of his wife and children. If the last will is established, it must be by closing our eyes to the obvious legal effect of facts established by undisputed evidence, and falling back on the arbitrary maxim, *sic volo, sic jubeo.* This we cannot do without subverting settled rules of law, which we are bound to maintain and enforce. Another significant and controlling feature of the case, in view of the helpless and dying condition of Mrs. Gardiner, is the fact that the written instructions for the will were prepared by the principal beneficiary. The rule of law on this subject is well-settled. It has been repeatedly announced by this court, and perhaps nowhere with more precision and directness than by the present Chief-Judge, in pronouncing judgment on the will of Henry Parish. "The maxim, *qui se scripsit hæredem,*" said the learned judge, "has imposed by law an additional burden on those claiming to establish a will, under circumstances which call for the application of that rule; and the court, in such a case, justly requires proof of a more clear and satisfactory character. Such a condition is exhibited by the testimony in the present case. The two codicils under consideration were exclusively for the benefit of Mrs. Parish, with the exception of the charitable gifts; and although they were not actually written by her, yet they were drawn up at her suggestion, upon her procurement, and by counsel employed by her. She prepared and gave the instructions for them, and, in judgment of law, they must be regarded as written by herself. '*Facit per alium, facit per se.*'" (Delafield v. Parish, 25 N. Y. 35.)

In this case there is no proof or pretence that the instructions were either written or dictated by the testatrix. It appears, from the testimony of the draughtsman, that Mrs. Gardiner expected them to proceed from Mrs. Tyler, and not from herself; and that she did not know, on the day the will was executed, whether such instructions were written or oral, though it is proved that they were written by the daughter two days before she transmitted them

to the draughtsman. The use in the instructions of the mother's name is not evidence that they were dictated by her; and in the absence of such proof, upon the state of facts here shown, the legal presumption is that they were not so dictated, and that they were prepared by the party in whose handwriting they appear. (Ingram v. Wyatt, 1 Haggard 384, 439; Croft v. Day, 1 Curteis 853, 856; Baker v. Batt, Id. 125.) In the case first cited, it was objected that the rule was severe in its operation, as the party who wrote the instructions could not testify; but the court said: "They are in the handwriting of Richard Wyatt, the father, a quarter as unfavorable, perhaps more so, as feeling a stronger interest than even Henry Wyatt himself. It has been said that Richard Wyatt was incapacitated by the state of his faculties from giving evidence; that he could not be examined; that he might have proved receiving these instructions from the deceased himself. That is mere conjecture, which cannot compensate for proof. If the evidence is by accident defective, the misfortune, especially in such a case as the present, must fall upon the party upon whom the burden of proof lies." (1 Haggard 439.) In the present case, even this consideration cannot be urged. Mrs. Tyler was at liberty to testify, but chose not to be examined, and to leave the matter as it stood.

Keeping in view, as we must, the dying condition of Mrs. Gardiner, at the time the transaction in question occurred, the force of the fact that the beneficiary wrote the instructions and originated the will is not necessarily overcome by the circumstance that they were afterward accepted by the testatrix, and that she assented to the will in which they were embodied. The observations, in one of the opinions delivered in the Parish case, are specially pertinent to this point. "The whole evidence of the case," says the learned judge, "places him in a position, where an enfeebled intellect, though far from losing its intelligence and its capacity to do ordinary business, may well be presumed unequal to resisting reiterated importunities from one in her relative position. It would seem plain that she could have exercised an influence in regard to this codicil which would not leave him to the exercise of his own free will. Are there any circumstances in this case to show that she did so? Or, does it appear that, having the power, she gained a victory over her naturally excited feelings, and mag-

nanimously forbore to use it? The whole burden of this codicil is for her benefit. Supposing that it was made under her control, *se scripsit hæredem;* nor, upon this supposition, would Mr. Lord's presence, and the fact that Mr. Parish assented intelligently, and deliberately, and in detail, to the provisions of the instrument, relieve her from that position; for the influence was easily exercised, when once its subject had been brought to submit to it, and in a way not at all suspicious, a way not likely to be observed by one who had no idea of its existence." (25 N. Y. 92.)

Thus Swinburne says, in commenting upon the effect of a testator's assent under similar circumstances: "It is to be presumed that the testator did answer yea, rather to deliver himself from the importunity of the defendant, than upon devotion or intent to make his will, because it is, for the most part, painful and grievous to those that be in that extremity to speak or be demanded any question, and, therefore, are ready to answer any question, almost, that they may be quiet; which advantage, crafty and covetous persons, knowing very well, are then most busy, and do labor with tooth and nail to procure the sick person to yield to their demands, when they perceive he cannot easily resist them, neither hath time to revoke the same afterward, being then passing to another world. And, therefore, worthily, and with great equity, is that to be deemed for no testament, when the sick person answereth yea, the interrogation being made by a suspected person, as well in respect of presumption of deceit in the one, as of defect of meaning of making a testament in the other. And this is true, especially when there is a former testament; for that is not to be revoked by a second testament, made at the interrogation of another in manner aforesaid." In the subsequent passage, he adds: "But, what if a will be brought to the sick man, which, being read over in his hearing, and he demanded whether the same shall stand for his will and testament, answereth yea, and it doth not appear whether the same was written and prepared by the direction of the sick man, or else of his kinsfolk and friends, whether it is to be presumed to have been prepared by his direction or by theirs? It seemeth, by the sick man, in favor of the testament; but, when it appeareth, indeed, to have been made ready by others, then, albeit the testator, being interrogated, do answer as before, it is presumed that the question was made by the suggestion or onsetting of the

executor, and so the testament is not good." (Swinburne on Wills, part 2, sec. 25).

These are the old landmarks of the law, and the judges should be the last to remove them. There is nothing in the present case to call for a departure from well-established rules, founded in plain principles of justice, and essential to the protection of rights and the prevention of fraud. They are tributary alike to the security of the living, the repose of the dying, and the harmony of the family relation.

So far as the proof discloses, the first connection of the testatrix with this will was within eight hours of death. Its essential provisions are directly traceable to the written instructions, which were prepared three days before by the daughter, who thus secured to herself the bulk of the mother's estate.

When the principal beneficiary under a will, prepared for execution by a party worn down by disease and close upon the verge of death, assumes the responsibility of initiating it, of preparing formal instructions, of employing the draughtsman, of selecting the witnesses, of being present at every stage of the proceedings, and of excluding those to whose inheritance a new direction is given, it behooves such beneficiary to be provided with evidence that the instrument expresses the honest and spontaneous purposes of the person who is called upon, at such a time, to reverse the provisions of a previous testamentary disposition, made in health and strength, in favor of those having clear claims upon the justice and bounty of the testator. (Delafield v. Parish, 25 N. Y. 35; Lee v. Dill, 11 Abb. 214; Lake v. Ranney, 33 Barb. 49; Bergen v. Udall, 31 Barb. 9, 25; Crispell v. Dubois, 4 Barb. 397; Marsh v. Tyrrell, 2 Haggard 87, 110; Barry v. Butlin, 1 Curteis 638.)

The studied privacy attending the preparation and execution of the will, the constant presence and vigilance of the principal beneficiary, and her omission to advise the son and the grandson of her mother's approach to death, are familiar and marked *indicia* of the exercise of undue influence, under circumstances like those developed by the evidence. (Crispell v. Dubois, 4 Barb. 397 · Delafield v. Parish, 25 N. Y. 41, 42.) Swinburne, with his usual quaint and pithy directness, speaks thus of the inferences deducible from this species of evidence: "If the wife, being made exec-

utrix, or any other person benefited by the testament, understanding that the testator is about to alter his will, will not suffer his friends to come unto him, pretending, peradventure, that he is fast asleep, or in a slumber, or the physician gave in charge that none should come to him, or pretending some other excuse, or else, all excuses set apart, do, for charity's sake, shut them forth of the doors; in these cases the testament is void, in detestation of such odious shifts and practices." (Swinburne on Wills, part 7, sec. 18.)

The will was made by the testatrix under two false impressions, which went to the very root of its provisions; one, that her daughter was poor, and the other, that her son was faithless and dishonest, and that he had purchased his farm with her money. That these were the operative inducements is assumed on the part of the proponent, as well as the contestants. The influence of the first is apparent upon the face of the will, and is established by extrinsic evidence elicited from the witnesses called to support it. The influence of the second is not only shown by the provisions of the will, but by the letters introduced by the daughter to account for them. In view of the prostrate and dying condition of the mother, of the fact that the will originated in the instructions written by the daughter, and of the various *indicia* of fraud which surround the whole transaction, the case is within the principle settled by the successive decisions of the Chancellor, of the Supreme Court, and of this court in the case of Lansing v. Russell. It is to be regretted that the very able opinion delivered by Judge MARVIN in this court is unreported, but it demonstrated, with irresistible clearness and force, the correctness of the rule settled in the courts below; that when the beneficiary is the active agent in procuring the execution, by one *in extremis*, of an instrument, disturbing dispositions previously settled, and where the transaction is surrounded by the usual *indicia* of undue influence, he is called upon to show that the inducements which confessedly led to the change were not unfounded and illusory. (3 Barb. Ch. 325, 340; 13 Barb. 510, 522, 526.) In the present case, there not only is an absence of such evidence, but it is proved, affirmatively, that the impressions under which the change was made were false.

It is true that the burden of establishing imposition and undue influence rests, in the first instance, upon the party by whom it is

alleged. Fraud is never to be presumed from the mere concurrence of temptation and opportunity, or from the mere fact that the chief actor is also the principal beneficiary. It must be established by affirmative evidence. It is thus established, however, when facts are proved from which it results as an unavoidable inference. When such evidence is furnished, the burden of repelling the presumption, to which it leads, is cast upon the party to whom the fraud is imputed.

It is not to be supposed that fraud and undue influence are ordinarily susceptible of direct proof. Subscribing witnesses are called to attest the execution of wills, but not the antecedent agencies by which they are procured. The purposes to be served are such as court privacy rather than publicity. "In some cases," as this court said in the case of Sears v. Shafer, "undue influence will be inferred from the nature of the transaction alone; in others, from the nature of the transaction, and the exercise of occasional or habitual influence." (2 Seld. 272.) The grounds for imputing it, as Sir JOHN NICHOLL said, in the case of Marsh v. Tyrrell, "must be looked for in the conduct of the parties, and in the documents, rather than in the oral evidence. The necessary inferences to be drawn from that conduct will afford a solid and safe basis for the judgment of the court. Where the oral evidence harmonizes with those evidences, a moral conviction rightfully follows; but the depositions, where they are at variance with the conduct of the parties, and with the *res gestae*, are less to be relied upon." (2 Haggard 84.) It was held, in this State, by the Court of Errors, that a circumstance indicative of undue influence was the fact, common to that case, and to this, that the donor was brought, before the execution of the instrument, to a state of causeless alarm as to the condition of his property, and of groundless suspicion against members of his own family. (3 Cow. 537, 572.) So, in the Parish will case, it was said, in the course of the comments upon the circumstances, raising a presumption of undue influence by the principal beneficiary: "Direct evidence of her control in these matters, of her actual exercise of undue influence in procuring her will to be executed by him, could hardly be expected. The means of keeping the influence out of sight were too many, and too easy of application. But, when such is the array of circumstances, when such a result is attained without any more

substantial, apparent cause, we are justified in saying, from the evidence, that the only cause to be inferred, which is in the least degree adequate to produce the result, is a long-continued, persistent, overpowering influence, to which his condition rendered him peculiarly subject, and which she was as peculiarly in a position to exercise." (25 N. Y. 95.)

In the present case, all the controlling facts tend to one inevitable conclusion. When the antecedent and surrounding circumstances are grouped in their appropriate relations, they carry to the conscience and the understanding the clear conviction that, when the mother affixed her signature, she was executing the daughter's will. It is no sufficient answer to the presumption of undue influence, which results from the undisputed facts, that the testatrix was aware of the contents of the instrument, and assented to all its provisions. This was the precise purpose which the undue influence was employed to accomplish. That consideration was urged in the case of Bridgman v. Green; but Lord Chief Justice WILMOT very properly replied, that it only tended to show, more clearly, the deep-rooted influence obtained over the testator. He added: "In cases of forgery, instructions under the hand of the person whose deed or will is supposed to be forged, to the same effect with the deed or the will, are very material; but in cases of undue influence and imposition they prove nothing, for the same power which produces one produces the other." (Wilmot, 70.) In the case of Huguenin v. Basely, Lord ELDON said: "The question is, not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced." (14 Vesey 299.) In a case somewhat analogous to the present, where the relations of the parties were reversed, and the execution of a deed was obtained by undue influence of the parent over the child, Judge EMOTT said: "If the mind of the donor was brought to a purpose, preconceived by the parent for his own sole advantage, by an influence which she could not escape in the circumstances in which she was placed, and which was deliberately used to effect such a purpose, then that influence, or its exercise, was undue and improper." (31 Barb. 25.)

We think the surrogate was right in rejecting the instrument propounded for probate; and we have not arrived at this conclusion, without giving to the questions, raised by the respective par-

ties, that full and careful consideration which seemed due to their interest and importance.

It is proper to add, that, if we had arrived at a different conclusion, the judgment of the court below must still have been reversed. As that decision was founded upon a conclusion on a question of fact, adverse to that of the surrogate by whom the will was rejected, the Supreme Court had no authority to adjudge that the instrument be admitted to probate, but should have coupled its order of reversal with a direction for a feigned issue, in accordance with the provisions of the statute. (2 R. S. 66, sec. 57; Alston v. Jones, 10 Paige 100; Auburn Theological Seminary v. Calhoun, 25 N. Y. 428.) That question, however, becomes unimportant, as we think there was no error in the decree of the surrogate. An appellate court has no authority to direct a feigned issue, unless it arrives at a conclusion on the question of fact adverse to that of the original tribunal.

The judgment of the Supreme Court should be reversed, and the decree of the surrogate rejecting the will should be affirmed.

The foregoing opinion was concurred in by *Davies*, Ch. J., and *Wright*, *Leonard*, and *Morgan*, JJ.

Peckham, J. (dissenting). The probate of the will was denied by the surrogate upon the ground that the respondent, Mrs. Tyler, had exerted undue influence over the testatrix. The Supreme Court were unanimously of opinion that no such influence was shown.

It is conceded that the will was executed in legal form—all the proof required by law for that purpose, was given. The burden of its impeachment then rested with the contestant. It is true the contestant makes a point that the testatrix was incapable of making a will from the time Dr. Clark first saw her, on the 2d of October, 1864, until she died, on the 4th. But there is no pretence for such a position in the evidence. The testimony of all the witnesses proves that her mind was sound and clear. One witness (the defendant himself) sought to qualify her capacity at another time. He is the only witness who intimated that his mother's faculties had failed in any degree. In his testimony he says: "Her mental powers, for the year prior to her death, did not appear so strong as they had been some two or three years pre-

viously. I thought I saw a falling off in her mental faculties." The only commentary necessary upon this judgment of the son, as to his mother's comparative mental condition during the last year of her life, is the fact that, for the last eight months of her life *he never saw her*. All the witnesses who did see her during that time are unanimous in saying that her mind was "sound and clear." Mrs. Stryker, with whom she boarded for some three months of that time in New York, and who saw her every day, says her mind was "perfectly clear and bright." Miss Cooper, who saw her very frequently, almost every day, during the same time, says, she was of "sound mind, perfectly sound"; and so of other witnesses. Besides that, three witnesses testified to the soundness and clearness of her mind when she executed this will. She died within four or five hours thereafter of bronchitis, which, like consumption, usually leaves the mind clear, up to the close of life. While in New York, though in delicate health, and under the care of physicians, she was able to attend to business and walk out, and did walk out, very frequently; she was not confined to the house. The question in the case, then, is, was this will procured by undue influence? The burden of proving such influence rests upon him who asserts it. It is alleged that the deceased was easily influenced. Who proves this allegation? The same and the only witness—the son himself. On the 5th of January, after giving his opinion as to "a falling off in her mental faculties," he adds: "Mrs. Tyler appeared to have the most influence over her during the last year of her life." Mark, that for the last eight months of that year, he had never seen his mother. Such an opinion, based upon no facts, if evidence at all, is not worth, and should not receive, the slightest consideration.

I have examined this case with care, and I have not been able to find in it the marks that usually attend a will obtained by undue influence. It is urged, as an evidence of such influence, that the deceased sent her son and his family away from her house to his own house. The act was right, eminently right. There were twenty persons in one house, and this son himself testified that "the house was very much crowded, very uncomfortably so." Who should leave? The daughter, a widow, with six children, with no home elsewhere, or the son?—a man, with a wife and three children, and "one of the handsomest farms on the island"

to go to, within two and one-half miles of his mother. Should she request her son to go to his farm, "one of the best on the island," or should she send her daughter, with her six children, into the street? Any man, with the heart of a brother in his bosom, could easily decide that question. The mother did as a kind mother ordinarily would, she sought to keep them all in her house, though to her great discomfort. But the peace of the family, as she said, required their separation. She thought David did not treat his sister kindly—he was not glad to see her when she returned. It is true that his letters show a great readiness to quarrel with her, and they heap gross personal abuse upon his sister. They, in fact, quarreled, and, as to this question, it is immaterial which was to blame. They must be separated; and in a letter, dated February 10, commencing "David," and indorsed "Mr. Gardiner," not so addressed, in kind terms she expressed her anxiety to have the occupation of her house, as she found herself "too uncomfortable to endure it any longer." An interlineation of part of a line was in her daughter's writing. The mother's decision, as to which one should leave, was the decision that every true woman in the land would have made, under like circumstances.

In a letter to his mother, written on the 14th of March, after he had left the house, the son says: "I was fully aware of the discomforts and inconvenience to which you submitted so patiently, in a crowded house, and with impaired health. It appeared to me quite unnecessary—certainly, I was not the cause of it." He not the cause? Then who was? Did his family (himself and wife, three children and servant,) add nothing to the crowd? Surely, his widowed sister and her children had as much right as this son and his in her mother's house. In the same letter he adds: "Had I left your house otherwise than at your request, I could not have felt that I had done right toward you." This would look as if he thought he had been staying there for the benefit of his mother, not his own. Yet, when requested to leave, and allowed to go to his own farm, this jealous, suspicious son is greatly outraged. Under date of the 8th of March, he complains to his mother that he has been "thrust from her presence with a family of little ones, through a course of deception, misrepresentation, and intrigue practiced upon her." This "deception," etc., is emphatically denied by his mother. But, under the facts, as conceded by the son

(of an overcrowded house, causing "discomforts and inconvenience to a mother with impaired health"), how unmanly and unjust his complaints at the action of his mother.

It is, also, insisted, as an evidence of undue influence, that the intestate labored under a misapprehension of facts, and that this alleged delusion is, that she was induced to believe that her daughter was poor and her son rich. The will and the testimony both show that deceased knew the actual facts as to each; she stated them several times, and they are nowhere contradicted. The deceased never said in her will, or elsewhere, that her son was rich. She said, and its truth is not denied, that he had one of the handsomest farms on the island, and his wife's father was rich. The character of the farm is not denied, and the wealth of the wife's father is proved to be a fact. As to the poverty of her daughter, the deceased knew the daughter had some property in Virginia, but she also knew that she had suffered great losses during the civil war. She made the larger provision for her, because, as she expressly stated in her will, her daughter had "been subjected to much injury and loss during the existing war, and had been obliged to leave her home and come North." No witness denies a word of that statement. It is conceded that the daughter had some fifteen hundred acres of land in Virginia, on the James river, and she had a summer house and some three acres of land near Point Comfort. In the will this property is particularly mentioned. She gives her the income of a larger share of the city property for life, "unless the loss and damage which her property, situated on the James river, and her property situated near Old Point Comfort, in the State of Virginia, shall have been sooner restored to her by the federal government." It appeared, from the testimony, that the farm of fifteen hundred acres "was in ruins"; that the furniture in the dwelling was all destroyed, even to the "curtains." There is no evidence in the case as to the value of the daughter's property in Virginia. It could afford her no income—none whatever. If we might refer to our individual knowledge and information as to such land, we should not place a high value upon the worn-out land of Virginia, which had laid in ruins for some years during the ravages of the civil war, especially if the owners were compelled to pay taxes upon them. There are, probably, thousands of such places for sale now in the South, and few or no purchasers.

Could a woman, with a family of six children, possessed of that ruined property alone, with nothing else to live upon, be regarded or spoken of as otherwise than poor? The civil war was then still pending. This is all the property the daughter had, or it is claimed she had; and the fact was well known to the deceased for a year prior to, as well as at, the making of the will. Upon these facts, no one, who does not wilfully deceive himself, or wish to deceive others, can claim that Mrs. Gardiner was under any delusion as to her daughter's property.

The other misunderstanding, as claimed, is, that in her will, she releases to her son all claims she has against him for moneys advanced for the purchase of his farm, and all other claims and demands against him when, in truth, she had made no such advances, and had no claims against him. There are several answers to this proposition.

First. The evidence is quite satisfactory that she had made advances to purchase the farm, and that her son was indebted to her. The farm cost $13,250, and $5,000 had been paid on it: the mother's place cost $9,500, and $4,500 had been paid thereon. The son lived with his mother after he attained his majority, and after his father's decease, from 1844 to 1849—five years—supported entirely by her in handsome style—I infer from the locality in the city. He had been admitted to the bar, but never practiced. In 1849 he went to California, he says at his own expense, mined and traded there, and returned in June, 1851. From that time until February, 1864, he lived with, and was supported by, her. He was married in 1860—it must have been in the first of the year, if not in 1859; and his wife and family all lived with his mother. He kept a horse and a servant. Prior to the arrival of his sister and children in the last of November, 1863, the family consisted of the deceased and her grandson, her son David and his family, although some of his sister's children were there prior to their mother's arrival. Yet for the two years prior to 1864, with a property, estimated by the son, at about $135,000, exclusive of debts, the expenses of the family considerably exceeded the income, under his management. He says that $3,500 must be raised to pay back taxes and assessments, besides one $800 assessment then unpaid. To this, add $1,200 a year (his charge for attending to his mother's business), and $500 a year for extra supplies to his

mother from his farm, as he claims, and the deficiency of his mother's property, under his care, to meet current expenses, was large. Who spent the money—the large income from her property? Where did it go? The uncontradicted statement of the mother was, that she "practiced the greatest possible economy, and entered into no expenses to serve her own purposes, and made no purchases for house or clothes that she could avoid." She even kept but one horse, as I infer from his letter, speaking of the expenses of keeping her "horse." The son and his family, his horse and his servant during this time, constituted the large share of the whole establishment. What services did he render that compared in value to the amount of these heavy expenses, incurred largely for him and his family? From 1851 to 1864 he attended to his mother's business. What did he do? He says he was engaged in collecting the rents, attending to repairs, and erected buildings in New York. Some buildings were torn down in the Bowery, and were erected in 1856, and completed in 1857, under his superintendence, as he says. Yet, architects were employed to draw the plans and oversee the erection, for which his mother paid. All he did was, he "was there occasionally" (to use his own language) "to see that the work was properly done"—this "occasional" attendance running through, perhaps, a year and a half. As to the rents, etc., he literally did nothing, as appears in his own evidence. It was all done by sub-agents, who were paid full prices (five per cent.), as the son testified on cross-examination, "for collecting the rents, paying the bill for repairs, attending to the lettings, ousting tenants in case rents were not paid, attending to the insurances generally, sometimes to the taxes, making up their accounts and handing them to him." What, then, did the son do in reference to all these services? He answers: "I handed them (the accounts) to my mother." He did not even do that, in fact. The accounts of her rents, for the years 1859 to 1863, inclusive, were not given her until May 6, 1864, as appears by his letter of that date, though repeatedly requested to do so. He and his mother, together, occupied the place where she died, of about eleven and a quarter acres, and he says he directed the hands how to manage that. But it would seem that he failed, from 1853 to 1864, to raise oats or straw enough for his horse and his mother's horse, but he was compelled to get the deficiency from his own farm. He kept his

mother's money and his own together, promiscuously, in the same bank account. His papers did not show, and he could not tell, what particular money he had deposited, or for what he had drawn it out. He sold the East Hampton property for his mother, in 1852, for $5,000. He says he paid $3,000 of it on a mortgage, and the other $2,000 was used in family expenses. This is all the reduction his services ever made on any mortgage. When inquired of, whether the rents and income were not sufficient to support the family, he answers: "I don't know." Though he had the entire charge as agent, he had no idea of the amount of the family expenses, nor, from the nature of the case, did he know his own, which, he claims, were small, and *some* of which, he claims were paid from his own means. When removed from receiving the rents of his mother, debts and taxes stand unpaid, and for months his mother is left without means for household expenses, and tries, in vain, to learn the condition of her property. Ultimately she finds a deficiency that astonishes her. He charges $1,200 per annum for services as agent, and $500 for annual supplies from his farm from the first year he bought it, without being able to specify anything that approached that amount. The checks from his check-books throw no more light upon his account, so far as the case shows, than would so many leaves from the coast survey. (It may be here added, that the son, in answer to his mother's expressed surprise at so great a deficiency in her money matters, wrote to her on the 16th of May, that he had observed "rigid economy," and "I kept an account of *all* expenses incurred, appertaining to the family as well as my own personal matters." If this were true, where is that account, and why was it not produced by him?)

His answers seemed perfectly natural to the inquiry, what moneys his mother advanced him to buy the Northfield farm: "None, to my knowledge." So as to what claims she had against him at the time of her death: "No claim, that I am aware of." Of course he did not know, and his answers here were just as proper as they were to the question, whether his mother's rents and income were not sufficient to support the family without using the $2,000 proceeds of sale of the East Hampton property, and he answered there as here, "I don't know." Yet this $2,000, that he "don't know" whether it was necessary to use for family expenses, was received shortly before the purchase of the Northfield farm.

He says he used the money he made in California to purchase that farm. It was impossible for him to say that, as all his and his mother's funds were deposited to one account; and how much he spent for the one or the other, he admits his utter inability to tell. Whether an advance was made with her money or with his, no one could tell. He admits he never furnished a dollar for the support of the family from 1844 to 1864. As between strangers, I think no fair man would hesitate to say that the balance of the accounts from this evidence was considerably against the son at his mother's decease. It is said that his mother thought otherwise, as appeared by her other will. If true, that was in 1858, and she had not then supported her son, with his wife, and family, servant and horse, for some four years. Besides, she did not then know, as appears by her letters, the great deficiencies in her means, while her property was under his charge.

There is another consideration. His mother, in giving instructions to her lawyer for drawing her will, distinctly told him that she had made advances to her son toward buying the Northfield farm; she did not say how much; could not state the amount; but she had made some. Does the son intend to say that his mother was guilty of a falsehood at that time? There is no evading this position by saying that his mother was then *in extremis*, or that she had been deceived by the daughter. As shown by the testimony of the most intelligent, impartial witnesses, who had known her for years, her mind was shown to be, then, "as clear as it had been at any time previous." The natural inquiry by the lawyer, on his return with the will drawn, when informed that she was worse, whether there was any doubt as to her ability and capacity to make a will, was answered by the medical attendant, that "there was none; that her mind was perfectly clear." After conversation with her as to the execution of the will, the lawyer gives the same opinion, and there is no contradiction.

As to the deception by the daughter, there is no proof that the daughter ever said a word on the subject to any one. In her instructions to the lawyer, nothing was said as to other claims; but the mother released the son in her will from all other claims.

As a witness, the son is not presented in the most favorable light. He stands alone, and is contradicted by every other as to a material fact. He destroyed evidence—letters of his mother, as

he first said, "not thinking it important to retain them"; and he "accidentally" preserved some. After conversing with his lawyer, some days after, he then says he destroyed them because he "thought they were dictated by Mrs. Tyler, and he was incensed." His indignation was discreet. It obviously destroyed only such letters as he deemed unfavorable to him. It carefully preserved the first, which, in his view, this reason for the destruction of the others should have clearly destroyed.

[The foregoing portion of the dissenting opinion has been given as an illustration of different views that may readily be taken by different minds, of facts of the kind here adduced to show undue influence. The opinion further proceeds at great length to discuss the evidence with a view of showing that it does not even raise a reasonable suspicion of undue influence, and that the authorities cited in the prevailing opinion have no bearing on the case in hand. The opinion concludes as follows:]

To resume:

This will was executed according to law, when the mind of the testatrix was sound and clear. It was carefully read over to, and fully understood by, her—she expressed her gratification that it was made.

It was also prepared by her own personal directions and instructions.

It was in substance in accordance with her wishes expressed in New York, when her daughter was not present, several months prior to its execution.

There is nothing, rising to the dignity of evidence, to show any undue influence over the testatrix.

The judgment of the Supreme Court should, therefore, be affirmed.

Hunt and *Smith*, JJ., were also for affirmance.

JUDGMENT REVERSED, and decree of surrogate affirmed.

UNDUE INFLUENCE.—ATTORNEY AND DRAUGHTSMAN AS LEGATEE.

Post et al. v. Mason et al.

NEW YORK COURT OF APPEALS, 1883.

(91 N. Y. 539.)

Danforth, J.—John Post made his will on the 13th day of September, 1874, and thereby, after giving to each child $40,000, to his wife the use for life of $40,000, and the homestead, with remainder to his children, $20,000 to the Ontario Orphan Asylum, to a nephew $3,000, smaller sums to his brother, to a clergyman and others, to his wife's mother for life a certain house and lot, with remainder to his heirs, provided for the improvement of his father's burial place and the erection of certain monuments, and then appointed Alonzo Wynkoop and Bradley Wynkoop, both his cousins, and Francis O. Mason, his executors and trustees for certain purposes, and gave to them in equal shares the remainder of his estate, amounting, as it now appears, to $17,513.66 personal property. He died on the 28th of September, 1874, leaving an estate of the value of about $200,000, and on the 24th of October, 1874, probate of the will was duly granted by the surrogate of Ontario County. This action was commenced in May, 1878, by the plaintiffs, as the widow, heirs, and next of kin of the testator, against the defendants, as executors and residuary legatees, praying that the probate of the alleged will be vacated, that the instrument be declared not to be the last will and testament of John Post, or, failing in these respects, that the plaintiffs be declared to be the owners of the residuary estate, and the defendants adjudged to hold the same as trustees for them.

The defendants, by answer, put in issue the case made by the complaint, and questions framed thereon were, on submission to the jury, answered by them in favor of the defendants. The plaintiffs then applied to the Special Term for a new trial upon exceptions taken to the charge of the trial judge, and his refusal to charge as requested by their counsel. This was denied. The court, thereupon, approved the verdict, and after findings of fact and law, on all points adversely to the plaintiffs' case, ordered judgment, dismissing the complaint.

We find no error in that decision. *First*, as to the charge; so

far as material to the proposition argued by counsel, the complaint alleged that Mason was a lawyer, and at the death of the testator, and for one or more years before that time, his friend and confidential attorney and counselor; that he wrote the will in question, and taking advantage of that relation, "improperly and illegally, if not fraudulently, induced" the testator to execute it in ignorance of its contents and effect; that the instrument was never read over to him, and he was never fully informed of its contents; that its probate was fraudulently procured at a time when the children were under the age of twenty-one years, and the widow uninformed of its contents. The answer of the defendants puts in issue every allegation tending to exhibit fraud or contrivance either as concerned the will or its probate, and in the most satisfactory manner details the various consultations which led to the will, and the intelligent instructions given by the testator for its preparation. Omitting immaterial questions, those framed for the jury were: *Fourth.* Was John Post, at the time he made and executed the will, of sound and disposing mind and memory, and competent to make and execute it? *Fifth.* Was it read over by or to him at the time of, or before its execution, and did he understand it and all its provisions? *Sixth.* Was its execution procured by undue influence? *Seventh.* Was the probate fraudulently obtained? *Eighth.* Was the plaintiff, Adelaide, informed of the contents of the will, and if so, when? *Ninth.* Did either of the defendants intentionally prevent either of the plaintiffs from becoming informed of the contents of the will? Upon the trial of these questions before the jury, it was conceded that the signature to the will was that of the testator; that the statutory formalities relating to its execution were complied with, and that it was admitted to probate at the time above stated. Witnesses were examined by the plaintiffs to establish, on their part, the questions in issue. They were answered by the defendants. In his charge to the jury the learned judge dwelt upon each proposition involved, in a manner satisfactory to the plaintiffs, except as I shall hereafter state. Upon the question of undue influence he said, upon the relation of client and counsel, "The law fastens a peculiar confidence," and all that is necessary to make the influence of the latter undue is that "they should use the confidence reposed in them, unfairly and dishonestly to operate as a moral coercion upon the testator, and

thus induce him to do what he otherwise would not have done." "The law," he said, "treats the exercising of this unfair influence as a fraud, but the law does not presume that a fraud has been committed in this or any other case. If a man clear in his mind, and competent to understand things, makes his will, the mere fact that he gives a legacy to the counsel who draws it does not invalidate the will at all." "It has this effect, however, if there is any evidence produced, tending to establish the fact that there was this undue influence, the law looks with more jealousy upon it than in other cases; it requires less evidence to find undue influence, when the will gives a legacy to the counsel, than if it was between persons not holding the relation I have adverted to." He added, "It is incumbent upon the plaintiffs in this case to prove some circumstances of suspicion, some evidence of an unfair exercise of the influence which Mr. Mason had over the testator, and if they have furnished such evidence it is incumbent upon the defendants to show you some evidence that no undue influence was exercised." To this clause the plaintiffs' counsel excepted, and asked the court to charge: "That this will having been written by Mr. Mason, who is a legatee, and is shown to have been for years before the will was made the legal adviser of Mr. Post, the same is presumed to be fraudulent; that the law itself, without any evidence at all, presumes that it was obtained by fraud; that the presumption was against the will until it was overborne by satisfactory evidence." The court declined, and the plaintiff excepted. These exceptions are to be considered together, and they present the question whether a will executed by one having full testamentary capacity is, as matter of law, to be deemed fraudulent for the simple reason that it contains a provision in favor of the draughtsman who was and had been the counsel of the testator. This is apparent when we read the charge and the request together. The court said: "If a man clear in his mind, and competent to understand things, makes his will, the mere fact that he gives a legacy to the counsel who draws it does not invalidate the will," and on the other hand, the appellant says: "The law itself, without any evidence at all, presumes it was obtained by fraud."

In Hindson v. Weatherill (5 De Gex, M. & G. 301) there is a case somewhat similar in its facts, and as viewed by the court presenting the same question. The plaintiff succeeded before the vice-

chancellor, on the ground that a solicitor of a testator, to whom the testator had made gifts, was a trustee of those gifts for the testator's heir at law and next of kin, but upon appeal the court thought otherwise, and deemed it unnecessary to say how the matter would have stood if undue influence or any unfair dealing had been established against him, for no such thing was done. The solicitor, they say, "prepared his client's will, containing dispositions in his own favor," adding, "there begins and ends the case as I view it. But a case so beginning and so ending does not take away the right, either legally or equitably, of a solicitor to be, for his own benefit, a devisee or legatee." This touches the very point as presented to the trial judge, and to the same effect are Coffin v. Coffin (23 N. Y. 9) and Nexsen v. Nexsen (2 Keyes 229). The proposition of the plaintiff excluded every circumstance but the occupation of the legatee, Mason, and his relation to the testator and the will. If acceded to it would have taken from the jury even the contents of that instrument, forbidden them to inquire whether the testator himself knew its provisions, or to consider the amount of the legacy, its proportion to the whole body of the estate, its relation to bequests to other parties, and those persons who were the natural objects of the testator's bounty, and other circumstances which had been detailed in evidence. I do not think it necessary to inquire whether such rule might apply to a controversy between an attorney and his client, where the former was seeking to enforce an obligation against the latter, or to an issue made upon the probate of a will under which the attorney was the principal beneficiary. There is certainly no rule of law which says an attorney shall not buy of, or contract with his client; there is only the doctrine that if a transaction of that kind is challenged in proper time, a court of equity will examine into it, and throw upon the attorney the onus of proving that the bargain is, generally speaking, as good as any that could have been obtained from any other purchaser, or in other words, that the bargain was a fair one. Then as to testamentary dispositions, as one does not, by becoming an attorney, lose the capacity to contract, neither is he thereby rendered incapable of taking as legatee, even under a will drawn by himself. That circumstance, if probate was opposed, might in some cases require something more than the usual formal proof of a due execution of the instrument, not because fraud was presumed, but because

it might be rendered more probable than in cases where the directions of the testator followed the lines of relationship. Coffin v. Coffin, and Nexsen v. Nexsen (*supra*) go no further. In the first, the fact that the draughtsman of the will was appointed executor and legatee was said to be suspicious only in connection with other circumstances indicative of fraud or undue influence, and in the other, although from an estate of $15,000, the draughtsman of the will, who was also the testator's agent, was appointed to receive all but $3,000, and so became the principal beneficiary under it, the court, citing Coffin v. Coffin (*supra*) held the same way. Both cases came up on appeal from surrogates' decisions on proceedings for probate, and require from the proponent in such a case testimony of a clear and satisfactory character. In Coffin v. Coffin the court sum up the matter in the language of Baron PARKE, in Barry v. Butlin (1 Curteis' Ecc. 637), and declare that "all that can be truly said is, that if a person, whether an attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each particular case, in some of no weight at all . . . . varying according to circumstances, for instance the *quantum* of the legacy, the proportion it bears to the property disposed of, and numerous other contingencies."

The relation of attorney and draughtsman no doubt gave in the case before us the opportunity for influence, and self-interest might supply a motive to unduly exert it, but its exercise cannot be presumed in aid of those who seek to overthrow a will already established by the judgment of a competent tribunal, rendered in proceedings to which the plaintiffs were themselves parties, nor in the absence of evidence, warrant a presumption that the intention of the testator was improperly, much less fraudulently controlled. Such indeed seems to have been the theory on which the action was brought, for the complaint not only alleges the confidential relation between Mason and the testator, but avers weakness and inability on his part, ignorance of the contents of the will, and advantage taken of these circumstances by the attorney to procure a bequest for his own benefit. In view, therefore, of the verdict of the jury and the findings of the court, we might dismiss the case. They have not only declared that the testator was of sound and disposing mind, competent to make a will and

under no restraint or undue influence, but that before execution the will was read and its provisions understood by him, and also that fraud was not practiced upon the testator nor upon the plaintiffs, to obtain probate, and have thus taken away every ground of relief, even if the Supreme Court had power to grant it. A somewhat more general question has, however, been argued for the appellants. The learned counsel insists that "the burden of proof is all there is of this controversy," and as the judge charged the jury that upon all the questions presented to them, "the plaintiffs held the affirmative," and again, that "the burden of proof is upon the plaintiffs to establish, by evidence, every allegation of fraud, and in the absence of such evidence, the issue must be found in favor of the defendants," there was error. Several propositions were thus involved. The questions submitted to the jury relate severally to the condition of mind of the testator, influence exerted upon him, whether probate was obtained by fraud, whether Mrs. Post learned the contents of the will within a given time, and whether either, and if either, which of the defendants prevented her from so doing. Upon some of these there could be no doubt whatever as to the burden of proof. The plaintiff's moving to set aside the will and its probate must do something more than call the defendants into court, and so they thought at the trial. For they opened the case to the jury, and upon every question took the affirmative, giving such evidence as they could. Even assuming, therefore, that the exceptions were pointed enough to call the mind of the judge to any particular error, we think his instructions were right. But if otherwise, it would not follow that our decision should go for the appellants. Application for new trials of questions submitted by a court of equity are governed by different principles from those which prevail on similar applications in a court of law. The object of the trial is attained when the court is satisfied that justice has been done, and in such a case a new trial will not be granted, even for misdirection to the jury (Head v. Head, 1 Turner & Russell 138), unless the error was vital or important. (Vermilyea v. Palmer, 52 N. Y. 471.) There are many cases to the same effect, but in this State the rule is now statutory, and any error in the ruling or direction of the judge upon the trial may, in the discretion of the court which reviews it, be disregarded, if it "is of opinion that substantial justice does

not require that a new trial should be granted." (Code of Civil Procedure, sec. 1003.) Upon this point neither the judge at Special Term nor the judges of General Term have entertained a doubt. Neither can we. Upon the question of fraud or undue influence, there is no evidence. The plaintiff's case stands, if at all, upon the single fact that a lawyer, the draughtsman of the will, was one of three residuary legatees, and thus receives a benefit. The proof is abundant that on the part of the testator there was adequate capacity, testamentary intention, and a due execution of the will, with full knowledge of its contents. This is enough. The record furnishes no reason for defeating the plain wishes of the testator. Aside from these considerations, however, it is apparent that so far as any question here is concerned, the will is to be regarded as one relating to personal property only, and we are of opinion that its probate by the surrogate must be deemed conclusive. As to this the statute is explicit. (2 R. S., tit. 1, part 2, chap. 6, art. 2, sec. 29, p. 61; Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; In the Matter of Proving the Will of Kellum, 50 Id. 298.)

It is, however, urged as ground for the interference of a court of equity, notwithstanding the probate of the will, that the executors may, as to the gift to them, be charged as trustees for the next of kin, if that gift was obtained by fraud, actual or constructive. Although the foundation for this contention is taken away by the decision of the other points, something should be said as to the proposition itself. Authority for it is not gathered from the decisions of the courts of this State, nor are we informed how it can stand in face of the statute (*supra*), which makes such probate conclusive. The whole, and each part of the will was before the surrogate, and allegations attributing any portion of it or any of its provisions to fraudulent practices, were then competent. They were made or might have been made, and in either event were embraced in his decision. If established, the will, or so much of it as was affected by the fraud, would have been rejected, and the property now claimed would have found its way by force of the statute of distributions to those entitled to it. We are, however, referred by the appellants' counsel to cases from the English courts, in support of his position. We think they are insufficient. Most of them (Marriot v. Marriot, 1 Str. 666; Segrave v. Kirwan,

1 Beatty 157; Bulkley v. Wilford, 2 Clark & Fin. 102; Barnesly v. Powel, 1 Ves. Sen. 287) are cited and commented on in Allen v. McPherson (1 House of Lords Cases, 191), where after probate of a will and codicils in the Ecclesiastical Court, a bill was filed by one R. A. in Chancery, stating that by the will and codicils the testator gave him large bequests which he revoked by the final codicil, and alleged that the testator had executed the last codicil when his faculties were impaired by age and disease, and under undue influence of the residuary legatee, and false representations respecting R. A.'s character, and moreover that he had not been permitted in the Ecclesiastical Court to take any objections to that codicil, except such as affected the validity of the whole instrument, and prayed that the executor or residuary legatee might be declared trustees or trustee to the amount of the revoked bequest. Upon demurrer, the court, with these and other cases before it, held that the Court of Chancery had no jurisdiction in the matter, and this was upon the ground that the Ecclesiastical Court had jurisdiction and might have refused probate, citing various instances where those courts had so applied the doctrine, and as to cases in which a court of equity had declared a legatee or executor to be a trustee for other persons, show that they presented questions of construction, or were cases in which the party had been named a trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate remedy, and were not cases of fraud. This decision was made in 1847, and in a much later case (Meluish v. Milton, L. R. 3 Ch. Div. 27, decided in 1876) it was followed by the Court of Chancery, where the heir-at-law and next of kin sought to have the executrix, who was also legatee, declared a trustee of the property for him. The relief sought was denied upon the ground that as the Court of Chancery could not set aside probate of a will of personal property, it could not make a legatee trustee for another person, on the ground of fraud, as that would be doing indirectly what the law will not allow to be done directly, and the court held that the exclusive jurisdiction of the Court of Probate in such cases is supported by convenience as well as by authority. So there are English cases where as the law stood, if a testator did not dispose of his residuary estate, the executors took a beneficial interest in it unless a contrary intention was expressed, and a court of equity was astute to find a

trust for the heir or next of kin. Segrave v. Kirwan (1 Beatty 157), so largely relied on by the appellants, was one of those cases. It was not there the intention of the testator to give the draughtsman anything more than the office of executor, but no residuary legatee was named, and he insisted that he was entitled to the residue of the personal estate, and so the law was. But it appeared that at the time he drew the will, he was not—nor was the testator—aware that under the dispositions and omissions of the will, he would be entitled to the residue; and the court charged the attorney as trustee for the next of kin, upon the ground that he should be deemed to have known the law, and having failed to instruct the testator in regard to it, should reap no advantage from his actual ignorance. But even in England the necessity for this interference was removed by statute (11 Geo. 4, and 1 Will. 4, chap. 40; Statutes of Great Britain and Ireland, vol. 12, part 1, p. 144), and we are cited to no case in this State where a court of equity has exercised such jurisdiction as the plaintiffs now invoke.

Upon all grounds, therefore, we think the judgment of the Supreme Court should be affirmed, with costs.

All concur.

JUDGMENT AFFIRMED.

EVIDENCE ON ISSUES OF INSANITY, UNDUE INFLUENCE, AND FRAUD.

In addition to the statements already made in the foregoing pages on the subject of evidence on these topics, it will be convenient here to add a few further important principles.

On all the topics above named, the condition of mind of the testator may be, and on at least one of them always is, a fact of importance. So far as concerns the issue of mental incompetency, the fact of testator's mental condition is the very fact in issue. On the issue of undue influence the testator's mental condition is a subsidiary fact bearing on the question of his susceptibility to pressure or crowding, and goes to make up the *atmosphere* surrounding the transaction, and assists in determining whether the other facts shown did succeed in overpowering his will without convincing his judgment. On the issue of fraud, it may sometimes have a similar bearing. On all these issues, consequently, any facts which, whether separately or in the aggregate, either show or logically tend to show his mental condition at the

time of execution, may, if otherwise competent in the particular case, be offered in evidence, either to support or to discredit the will. Among these facts, as we have already seen (Waterman v. Whitney, and other cases, given *ante*), is the fact that testator made certain declarations, either before,[1] at, or after execution, tending to indicate the mental condition, at the time of execution, of the person making them. They are not admissible as evidence of the facts which they purport to allege, but merely as evidence of the state of testator's mind. If, however, they were made at the time of execution, they are admissible, if otherwise competent, as part of the *res gestae*, as to show the *intent* with which the act of execution was performed.[2]

As to other evidence, its admissibility varies somewhat with the issue involved. Where the issue is mental incompetency, any direct evidence of facts relating to testator's mental condition, at the time of execution, is admissible. And although it must relate to, or logically bear upon, that particular time, it may, like evidence of testator's declarations, deal with facts occurring before, or at, or after execution, and even long before or after, so long as it has any reasonable tendency to throw light upon testator's mental condition when he executed the will.[3] Thus, it is admissible to show the letters written by testator, or the fact that he kept his own books of account, drew checks, made deposits, engaged in business transactions, managed his own business, made purchases, held responsible positions calling for the exercise of care and judgment, or, on the other hand, was under guardianship, or was not trusted with money, and so on. Many illustrations of the sort of evidence that may be adduced on this issue, both to prove and to disprove mental competency at the date of execution, will be found in the foregoing cases.

On the issue of undue influence, all the foregoing facts may be shown for the purpose of proving testator's mental condition as a subsidiary element in the general charge of undue influence. From the nature of the issue, evidence is also admissible to show his relations with the beneficiaries under the will,[4] and with those

[1] Hammond v. Dike, 42 Minn. 273; Conway v. Vizzard (Ind.), 23 N. E. 771.
[2] Chaney v. Home etc. Society, 28 Ill. App. 621.
[3] Steadman v. Steadman (Penn.), 14 Atl. Rep. 406.
[4] Carpenter v. Hatch, 64 N. H. 573.

who might naturally be expected to appear as beneficiaries,[1] his affections and hatreds, his likes and dislikes, as bearing on the question of the reasonable likelihood of a person with the feelings and opinions thus shown, making such a will as that propounded. So also the acts and demeanor, in so far as they bear on the issue, of the persons charged with exercising the undue influence, may be shown, and their relations to testator, their proper claims on him, the methods adopted, if any, to influence or crowd or coerce him, and the opportunities they had for doing so. Under this head, former wills executed by testator, and the continuance or change of the conditions which led him to make the provisions contained in them, may be offered.[2] In short, direct evidence of all facts may be given, which has a legitimate and sensible bearing on these two questions,—namely, whether efforts were made to override testator's free will, and whether they succeeded. Of these facts numerous illustrations may also be found in the foregoing cases.

On the issue of fraud, such facts may, or may not have a legitimate bearing, according to the nature of the particular charge, but if they do have, they are admissible, together with other facts going to show or make out the charge of fraud on the general principles of evidence applicable to that issue under any circumstances and in any kind of suit.

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[1] Staser v. Hogan, 120 Ind. 207.

[2] Colhoun v. Jones, 2 Redf. 84; Tyler v. Gardiner, given *ante*.

CHAPTER III.

EXECUTION.

I.—Signing by the testator.
II.—Making or acknowledgment of signature before witnesses.
III.—Declaration of the will to witnesses.
IV.—Request to witnesses to sign.
V.—Attestation and signature by witnesses.

Although the statutes of England and our States vary a good deal among themselves in the details of their requirements for due execution, there are certain features, some of which are common to most of them, which may here be stated. Special care, however, is needed to notice the bearing upon any given decision of the exact requirements and phraseology of the statute whose construction is involved. And no attempt will of course here be made to discuss the special and peculiar provisions of the varying statutes of the several States.

It may in general be said that due execution usually requires some or all of the following acts, according to the terms of the controlling statute:

1. Signing by the testator.
2. Making or acknowledgment of signature before witnesses.
3. Declaration of the will to witnesses.
4. Request to witnesses to sign.
5. Attestation and signature by witnesses.[1]

These requirements we will examine in order.

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[1] The order in which the several steps are taken is generally immaterial. Jackson v. Jackson, 89 N. Y. 153 (159). Thus in Matter of Phillips, 98 N. Y. 267, where the testator declared the instrument to be his last will and testament, after the witness had begun, and before he had finished, writing his name, it was held a sufficient declaration. So where testatrix declared the instrument to be her will, while signing her name, and made her request to the

I. SIGNING BY THE TESTATOR.

The various methods of signing wills may be classified in two groups.

In one group of cases the testator, *by his own physical exertion*, fixes upon the instrument some visible impression intending it to constitute his signature. It is to be noticed that this statement does not necessarily confine him to the use of any particular materials, or of any particular kind of marks. But whatever the signature may consist in, it must have been intended by testator, at the time, to be, or stand for, his signature to the instrument. And the use of materials peculiarly liable to be destroyed or defaced may raise a presumption, and even a conclusive presumption, that no formal testamentary act could have been intended.

Illustrations.

(*a*). A. signed his will by merely marking a cross.[1]

(*b*). A testator wrote at the end of the will his initials.[2]

(*c*). Another testator impressed upon wax, affixed to the instrument, his initials engraved on a seal.[3]

(*d*). C. signed her will by her first name—Catherine—and nothing more.[4]

In all the foregoing cases the "signing" was held to be sufficient.

witnesses before she signed herself, though they in fact signed after her. Williams' Will, 15 N. Y. Supp. 828. Substantial compliance is all that is required. This principle has been carried so far that in New Jersey it has been *said*, in Mundy v. Mundy, 15 N. J. Eq. 290 (294), that the fact that a witness signed *before* instead of *after* testator would be immaterial, citing as authority Vaughan v. Burford, 3 Bradf. 78: "The particular order of the several requisites to the valid execution of a testament is not at all material." But the New York case thus cited is erroneous. The witnesses must sign after the testator has signed, in New York. Jackson v. Jackson, 39 N. Y. 153. For the fact that testator has signed is one of the things which the witness is to attest. Pawtucket v. Ballou, 15 R. I. 58; Simmons v. Leonard (Tenn.), 18 S. W. Rep. 280.

[1] Nickerson v. Buck, 12 Cush. 332; Robinson v. Brewster (Ill.), 30 N. E. Rep. 688.

[2] Re Savory, 15 Jurist 1042.

[3] Goods of Emerson, L. R. 9 Ir. 443; see also Jenkins v. Gaisford, 3 Sw. & Tr. 93. A mere sealing, not intended for a signature, will not, however, constitute a signing. Goods of Emerson, L. R. 9 Ir. 443.

[4] Knox's Estate, 131 Penn. St. 220.

(*e*). Patrick J. O'Neill, the testator, began to sign, and wrote as far as "Pat"—and then desisted, not as having completed all he set out to write, but because too weak to go on. It was held that this was not sufficient. What was written was not intended as a complete signature.[1]

(*f*). Testator "made his mark," and a witness, Miller, wrote around it the testator's name, thus "Moses W. S. Jackson, his mark." It was of no consequence whether this writing preceded or followed the making of the mark. The mark itself is the signing called for by the statute. The name written around it is merely a convenient memorandum to designate the mark.[2]

(*g*). David Long, the testator, signed his will with a mark, about which the draftsman wrote, by mistake, *Jacob* Long. The mark being itself the signature, the due execution was not vitiated because some one else wrote a wrong name against it.[3]

(*h*). Testator's hand, when he signed his will, was guided by that of some one else. This was a signing by the testator himself.[4]

The foregoing instances illustrate cases where the signature was made by testator himself. But there is a second class of cases where this is not done. Our statutes of wills, like the English statute, usually permit the signature to be made *by another person* at testator's request and in his presence.[5] But where the statute merely provides that the will must be *signed* by testator, omitting the alternative provision, here it has been held in New Jersey that signature by another for him will not suffice.[6]

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[1] Knapp v. Reilly, 3 Dem. (N. Y.) 427.

[2] Jackson v. Jackson, 89 N. Y. 153.

[3] Long v. Zook, 13 Penn. St. 400. To the same point, Goods of Clarke, 1 Sw. & Tr. 22.

[4] Stevens v. Vancleve, 4 Wash. C. C. 262.

[5] In Minn. the statute requiring that a will may be signed by another for testator, "by his *express* direction," excludes a mere passive assent and calls for a clear active direction either by words, gestures, motions, looks or signs, of some sort. Waite v. Frisbie, 45 Minn. 361.

[6] Re McElwaine, 3 C. E. Green 499; Fritz v. Turner, 46 N. J. Eq. 515.

TESTATOR'S SIGNATURE.—GENERAL DISCUSSION.

Knox's Estate.

PENNSYLVANIA SUPREME COURT, 1890.

(131 Penn. St. 220.)

Appeal to the Supreme Court from the decree of the Orphans' Court of Alleghany County, affirming the decision of the register of wills, admitting to probate as a will, an instrument, the signature to which was merely the first name, "Harriet." One of the grounds of the appeal was that this did not constitute a "signature" under the statute.

Opinion, Mr. Justice Mitchell. [After considering other questions raised on the appeal.]

It being undisputed that the paper is in the handwriting of the decedent, and being testamentary in its character, the only question left[1] upon its validity as a will is the sufficiency of its execution by the signature "Harriet."

The paper is proved to have been written after the passage of the act of June 3, 1887, P. L. 332, and the fact that the decedent was a married woman is therefore unimportant. That act repealed the requirement that a married woman's will should be executed in the presence of two witnesses, neither of whom should be her husband, and put her, in respect to signature by herself, upon the same footing as men and unmarried women. No greater effect can be attributed to the statute. It certainly was not intended to authorize a married woman to execute a will any more loosely than other persons. We are therefore remitted to the general question whether a signature by the first name only may be a valid signing of a will under the act of 1833 and its supplements.

The condition of the law before the passage of the wills act of 1833 is well known. By the English statute of frauds, all wills as to land were required to be in writing, signed by the testator. Under this act it was held that the signature of the testator in any part of the instrument was sufficient: 1 Redf. on Wills, c. 6, sec. 18, pl. 9, and cases there cited. The same construction was given

[1] The law of Pennsylvania concerning execution of holographic wills is, as in some other States, peculiar, and unlike the usual laws.

to the law in Pennsylvania, and under the act of 1705, 1 Sm. L. 33, which required wills of land to be in writing and proved by two or more credible witnesses, etc., it was even held that a writing in the hand of another, not signed by the testator at all, might be a good will: Rohrer v. Stehman, 1 W. 463. In this state of the law the act of 1833 was passed. It was founded on the English statute of frauds, 29 Car. II., the phraseology of which it follows closely, but with the important addition that the will shall be signed "at the end thereof." In making this change, it is undoubtedly true, as suggested by STRONG, J., in Vernon v. Kirk, 30 Pa. 222, that the legislature "looked less to the *mode* of the signature than to its *place*." Accordingly, the statute makes no definition of a signature, or of the word, signed. "It was only by judicial construction that . . . . (the statute) was made to require . . . . the testator's signature *by his name*": STRONG, J., Vernon v. Kirk; and that judicial construction which held that a mark was not a valid signature: Asay v. Hoover, 5 Pa. 21; Grabill v. Barr, 5 Pa. 441, decided in 1846, was changed, it may be noted, by the legislature as soon as their attention was directed to it: Act January 27, 1848, P. L. 16.

The purposes of the act of 1833 were accuracy in the transmission of the testator's wishes, the authentication of the instrument transmitting them, the identification of the testator, and certainty as to his completed testamentary purpose. The first was attained by requiring writing instead of mere memory of witnesses, the second and third by the signature of testator, and the last by placing the signature at the end of the instrument. The first two requirements were derived from the English statute; the third was new (since followed by the act of 1 Vict., c. 26), and was the result of experience of the dangers of having mere memorandum or incomplete directions taken for the expression of final intention: Baker's App., 107 Pa. 381; Vernon v. Kirk, 30 Pa. 223. These being the purposes of the act, and the legislature not having concerned itself with what should be deemed a signing, we must look dehors the statute for a definition. As already said, the act is founded on the statute of frauds, 29 Car. II. Under that act it has been held that the signing may be by a mark, or by initials only, or by a fictitious or assumed name, or by a name different from that by which the testator is designated in the body of the

will: 1 Jarman on Wills, 78; 1 Redf. on Wills, c. 6, sec. 18, and cases there cited. In this State, as already seen, it was held, on a narrow construction of the act of 1833, that a mark was not a signing; but on the other points, so far as they have arisen, our decisions have been in harmony with those of the English courts. Thus, in Long v. Zook, 13 Pa. 400, the will of David Long was held to be validly executed by his mark, although the mark was put to the name of Jacob Long. In Vernon v. Kirk, 30 Pa. 218, "Ezekiel Norman, for Rachel Doherty, at her request," was held to be a valid signing under the act. And in Main v. Ryder, 84 Pa. 217, it may be noted that a mark was held to be a good signature (subsequent to the act of 1848), though put to a name which was not the testator's real or at least his original name, though it was one by which he had been known for some years in his own neighborhood. No question was raised against the will on this point.

The precise case of a signature by the first name only, does not appear to have arisen either in England or in the United States; but the principles on which the decisions already referred to were based, especially those in regard to signing by initials only, are equally applicable to the present case, and additional force is given to them by the decisions as to what constitutes a binding signature to a contract under the same or analogous statutes. Browne on the Statutes of Frauds, sec. 362, states the rule thus: "In cases where the initials only of the party are signed, it is quite clear that, with the aid of parol evidence which is admitted to apply to them, the signature is to be held valid." And see Palmer v. Stephens, 1 Den. 478; Sanborn v. Flagler, 9 Allen 474; Weston v. Myers, 33 Ill. 432; Salmon Falls Co. v. Goddard, 14 How. 446; Chichester v. Cobb, 14 Law T., N. S. 433. Though, therefore, we find no precise precedent, yet the analogies are all favorable, rather than otherwise, to the sufficiency of a signing by first name only, if it meets the other requirements of the act. These are matters depending on circumstances which will be considered further on. Looking beyond the decisions to the general use of language, what is understood by signing, and signature? Webster defines to sign as "to affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting"; and signature as "a sign, stamp, or mark impressed; . . . . especially the name of any person writ-

ten with his own hand, employed to signify that the writing which precedes accords with his wishes or intentions; a sign manual." All the definitions include a mark, and no dictionary limits a signature to a written name. There can be no doubt that historically, and down to very modern times, the ordinary signature was the mark of a cross; and there is perhaps as little question that in the general diffusion of education at the present day, the ordinary use of the word implies the written name. But this implication is not even yet necessary and universal. The man who cannot write is now happily an exception in our commonwealth, but he has not yet entirely disappeared, and in popular language he is still said to "sign," though he makes only his mark. Thus, in Asay v. Hoover, 5 Pa. 26, the witness says: "The name was written after the will was read to her, and after she *had signed* it. . . . . She was reclining in bed when she *signed* it," although the signature the witness was testifying to was only a mark. But, even in the now usual acceptation of a written name, signature still does not imply the whole name. Custom controls the rule of names, and so it does the rule of signatures. The title by which a man calls himself and is known in the community is his name, as in Main v. Ryder, *supra*, whether it be the one he inherited or had originally given him or not. So the form which a man customarily uses to identify and bind himself in writing is his signature, whatever shape he may choose to give it. There is no requirement that it shall be legible, though legibility is one of the prime objects of writing. It is sufficient if it be such as he usually signs, and the signatures of neither Rufus Choate nor General Spinner could be rejected, though no man, unaided, could discover what the ragged marks made by either of those two eminent personages were intended to represent. Nor is there any fixed requirement how much of the full name shall be written. Custom varies with time and place, and habit with the whim of the individual. Sovereigns write only their first names, and the sovereign of Spain, more royally still, signs his decrees only, "I, the King," (Yo el Rey). English peers now sign their titles only, though they be geographical names, like Devon or Stafford, as broad as a county. The great Bacon wrote his name Fr. Verulam, and the ordinary signature of the poet-philosopher of fishermen was Iz: Wa:. In the fifty-six signatures to the most solemn instrument of modern

times, the Declaration of Independence, we find every variety from Th. Jefferson to the unmistakably identified Charles Carroll of Carrollton. In the present day, it is not uncommon for business men to have a signature for checks and banking purposes somewhat different from that used in their ordinary business, and, in familiar correspondence, signature by initials, or nickname, or diminutive, is probably the general practice.

What, therefore, shall constitute a sufficient signature must depend largely on the custom of the time and place, the habit of the individual, and the circumstances of each particular case. As already seen, the English and some American cases hold that a signature by initials only, or otherwise informal and short of the full name, may be a valid execution of a will or a contract, if the intent to execute is apparent. To this requirement our statute adds that the signature must be at the end, as evidence that the intent is present, actual and completed. On this point of the completed act, the use of the ordinary form of signature is persuasive evidence, and the absence of it may be of weight in the other scale. As well suggested by the learned judge below, if a will drawn with formality, or in terms that indicate the aid of counsel, or the intent to comply with all the forms of law, be signed with initials or first name only, doubt would certainly be raised as to the completed purpose of the testator to execute it, and if then it appeared that his habit was to sign his name in full, the doubt might become certainty; while, on the other hand, if it were shown that he usually, or even frequently, signed business or other important papers in the same way, the doubt might be dissipated. As in all cases where the intent is the test, there can be no hard and fast legal rule as to form. The statute requires that the signature shall be at the end, and that requirement must be met without regard to intention, but what shall constitute a signature must be determined in each case by the circumstances.

Tested by these views, the will in the present case appears to have been well executed. Of the handwriting and of the identity of the testatrix there is no question, and her completed intent to execute the paper, as the expression of her testamentary wishes, is attested at the end of it by a signature admitted to be made by her, and shown to be in the form which she habitually used. The writing has not the usual formalities of a will, but is in form a

letter, addressed to no one by name, but clearly intended for her mother, or such of her family as should assume control of her property after her death; and the form of the instrument might well account for the signature she was accustomed to use, were it not still more clearly explained by the unfortunate differences with her husband, and her repugnance to using his name, as shown by her avoidance of it in her correspondence, and her direction not to put it on her tombstone. On the evidence, it is clear that the testatrix intended this as a complete execution of the instrument, and we find nothing in the law to defeat its validity for that purpose.

Judgment affirmed.

SIGNATURE BY ENGRAVED STAMP.

Jenkins v. Gaisford and Thring. In the Goods of John Jenkins (deceased).

ENGLISH COURT OF PROBATE, 1868.

(3 Sw. & Tr. 93.)

Probate of will and two codicils.

Henry Atkins deposed that he was testator's amanuensis, and often employed a stamp bearing a fac-simile of testator's signature, to sign testator's letters, as testator had had difficulty in writing; that at testator's request he had thus stamped the name on each of the two codicils and thereupon testator laid his hand on the paper and acknowledged the signature.

Probate refused on motion. After special declaration, and citation to next of kin, the question of the sufficiency of the signature was argued *ex parte* by Dr. Spinks.

SIR *C. Cresswell.*—I am of opinion that the codicils were duly executed so as to comply with the 1 Vict., c. 26, s. 9. It has been decided that a testator sufficiently signs by making his mark, and I think it was rightly contended that the word "signed" in that section must have the same meaning whether the signature is made by the testator himself, or by some other person in his presence or by his direction, and therefore a mark made by some other person under such circumstances must suffice. Now, whether the mark is made by a pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a fac-simile of the whole name was impressed on the will instead of a

mere mark or X. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator. In the case where it was held that sealing was not signing, the seals were not affixed by way of a signature.

EXECUTION.—SIGNED BY MARK.—WRONG NAME.

In the Goods of Susanna Clarke (deceased), on Motion.

ENGLISH COURT OF PROBATE, 1858.

(1 Sw. & Tr. 22.)

The testatrix executed a will in 1844, by mark. Against her mark the name Susanna Barrell (her maiden name) was written instead of Susanna Clarke, her real name, and the one by which she was described in the commencement of the will and in the testimonium clause.

Shortly before her death, she delivered the will in a sealed envelope to F., one of the executors named therein, in whose custody it remained until after her death, telling him "that she wanted him to manage for her." F. deposed that both the attesting witnesses were dead, that the will was in the handwriting of Sidney, one of them; and he believed the word "Barrell" to have been a clerical error of Sidney's.

Dr. *Deane*, Q. C.: The execution satisfies the Wills Act. (In the goods of Bryce, 2 Curt. 325, and In the goods of Clark, Ib. 329.)

SIR *C. Cresswell.*—There is enough to show that the will is really that of the person whose it professes to be. Her mark, at the foot or end of it, is a sufficient execution, and that which some one else wrote against her mark cannot vitiate it.

THE POSITION OF THE SIGNATURE.

In some statutes the place of the signature is not prescribed.[1] According to others, it is prescribed, as, for instance, in Ohio the will must be "signed at the end";[2] in New York, "subscribed at the end"; in England, "signed at the foot or end," etc. Under

[1] See Armstrong v. Armstrong, given *post*.

[2] Glancy v. Glancy, 17 O. St. 134.

both forms there are numerous cases arising out of the position of the signature. The following will show the principles of the two systems.

(*a*). *Position not specified by Statute.*

The testator wrote out his own will, beginning "*In the Name of God*, Amen, *I*, John Stanley, *make this my last will and testament.*" He did not subscribe his name, but affixed his seal, and had the will subscribed by three witnesses in his presence. "And after several Arguments it was adjudged by the whole Court, *sc. North*, *Wyndham*, *Charlton* and *Levinz* to be a good will; for being written by himself, and his Name in the Will, it is a sufficient Signing within the Statute, which does not appoint where the *Will* shall be signed, in the *Top*, *Bottom*, or *Margin*, and therefore a Signing in any Part is sufficient." [1]

TESTATOR'S SIGNATURE.—POSITION.—WRITTEN BY ANOTHER.

Armstrong's Ex'r vs. Armstrong's Heirs.

ALABAMA SUPREME COURT, 1857.

(29 Ala. 538.)

Appeal from the Court of Probate of Lawrence, which, on application for probate of the will of James Armstrong, deceased, sustained a demurrer to proponent's evidence.

The will began in these words:

"In the name of God, amen. I, James Armstrong," etc. The name of the testator did not appear elsewhere. The entire instrument was in the handwriting of testator's physician, Dr. Massie, and was dictated by testator, and approved and adopted by him when written. Probate was contested on the ground that the will had not been duly signed.

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[1] Lemayne v. Stanley, 3 Lev. 1; under the present English statute of wills the testator's signature must be signed at the foot or end of the will. (For a further English statute on this subject see Appendix, *post*.) The statute under which this case arose, however, the Statute of Frauds, 29 Charles II., is that on which most of our statutes of wills are based, and it has been often cited and on this point approved in cases arising under them in States where no statutory change has been made. See Armstrong v. Armstrong, *post*.

Rice, C. J.—By our statute law, every person over the age of eighteen years, of sound mind, may by his last will dispose of all of his personal property; and every person of the age of twenty-one years, of sound mind, may by his last will devise his lands, or any descendible interest he may have therein. Code, secs. 1589, 1595.

Except in certain cases, of which the present is not one, the formalities requisite to a will, under section 1611 of the Code, are, 1st, that it be in writing; 2d, that it be signed by the testator, "*or by some person in his presence, and by his direction*"; 3d, that it be attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator.

In the case at bar, it appears clearly from the evidence, that the first and third of these requisites have been complied with; and the question is, whether the second of them has been complied with.

Section 1611 of the Code, so far as it relates to the second requisite, is a substantial transcript of that part of the 5th section of 29th Car. II., ch. 3, which related to *the signing* of the will; and therefore, the construction which has been put upon that part of the British statute, and settled as its true construction, by the British decisions before the adoption of our statute, ought to be regarded as the construction which our legislature intended to be put upon that part of our statute now under consideration. We shall adopt and follow that construction.

According to those decisions, if the testator with his own pen writes his own name in the beginning of the will, thus, "I, James Armstrong," with the design of giving it authority, and acknowledge it to be his writing when he calls the subscribing witnesses to attest it; and if, at the time of acknowledgment, he does not intend to subscribe it, the signing is sufficient, under the statute, without any subscription of his name at the bottom. Lemayne v. Stanley, 3 Lev. 1; Morison v. Turnour, 18 Vesey 176; Ellis v. Smith, 1 Ib. 11; Grayson v. Atkinson, 2 Ib. 454; Stonehouse v. Evelyn, 3 P. Wms. Rep. 254; Miles' Will, 4 Dana's Rep. 1; Jarman on Wills, 70.

It is not essential that the testator should write his own name. The British statute, as well as our own, allows a will to be signed for him by another; and his name, when written by another, for him, in his presence, and by his direction, will have the same effect as if it had been written by himself. Although his name is not

written by himself, nor subscribed to the will; yet, if it be written in the beginning of the will by another, in his presence, and under his direction; and if it be acknowledged by him to the attesting witnesses, at the time he calls on them to attest and subscribe it, it will be as effectual as if with his own pen he had written it. See the authorities cited *supra;* and Martin v. Wotton, 1 Lee 130; In the goods of Clark, 2 Curteis 329; Addy v. Grix, 8 Vesey 505; 10 Bacon's Abr. (edition of 1846), 490–503.

As the party who opposed the probate of the will in this case, interposed a demurrer to the evidence, and there was a joinder therein, it was the duty of the court to have decided against him, if the jury from that evidence could legally have found against him. We do not say, that from the evidence the jury would have been bound to find against him; but we think they might legally have done so. Although it may not be a *necessary* inference from the evidence, that the name of the testator was written by Dr. Massie in his presence, and by his direction; yet it is an inference which the jury might legally have drawn. Spencer, adm'r of Donaldson, v. Rogers, adm'r of Waters, at this term; Shaw v. White, 28 Ala. 637.

The court below erred in sustaining the demurrer to the evidence; its judgment is therefore reversed, and the cause remanded.

[Adams v. Field, 21 Vt. 256. Sometimes the statute, without specifying the position of the signature, calls for a signing "in such a manner as to make it manifest that the name is intended as testator's signature." Warwick v. Warwick, 86 Va. 596.]

TESTATOR'S SIGNATURE.—WHERE POSITION NOT SPECIFIED.[1]

Matter of Will of Booth.

NEW YORK COURT OF APPEALS, SECOND DIVISION, 1891.

(127 N. Y. 109.)

This case involved the validity of a New Jersey will. Testator's name appeared only at the beginning of the will.

Follett, Ch. J.—At common law, if a person wrote his name in

[1] It will be noticed that although this is a New York case it does not deal with a New York will or with the New York statute.

the body of a will or contract with intent to execute it in that manner, the signature so written was as valid as though subscribed at the end of the instrument. (Merritt v. Clason, 12 John. 102; s. c. *sub nom.* Clason v. Bailey, 14 Id. 484; People v. Murray, 5 Hill 468; Caton v. Caton, 2 H. L. 127; 2 Kent's Com. 511; 1 Dart's V. P. [6th ed.] 270; 1 Jar. Wills [Big.'s ed.] 79.)

We shall assume, without deciding, that under the laws of New Jersey a will may be legally executed if the name of the testator is written by him in the body of the instrument with intent to so execute it. The statute of that State which prescribes the mode in which wills shall be executed, provides: "All wills and testaments . . . . shall be in writing and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will in the presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator." Under this statute it was held *In re* McElwaine (18 N. J. Eq. 499) that "four things are required: First, that the will shall be in writing. Secondly, that it shall be signed by the testator. Thirdly, that such signature shall be made by the testator, or the making thereof acknowledged by him in the presence of two witnesses. Fourthly, that it shall be declared to be his last will in the presence of these witnesses. Each and every one of these requisites must exist. They are not in the alternative. The third requisite contains an alternative, but one of these alternatives must exist. The second requisite, the signing by the testator, must exist. The second alternative of the third, to wit, that he acknowledged 'making of the signature,' will not supply the want of the second. Where there is no proof as to the making of the signature, such acknowledgment is sufficient evidence that he made it, and would prove compliance with the requisite of signing by him. But when it is clear that the testator did not sign the will, this acknowledgment is not sufficient. The words of the act are clear, and the object is equally clear, and requires this construction to the words." This language was used in respect to a will to which the name of the testatrix was subscribed by one of the subscribing witnesses at her request, in her presence, and in the presence of both subscribing witnesses. After this was done the testatrix said "that was her name and seal," but did not acknowl-

edge it to be her signature, nor did she then declare that the instrument was her will; and it was held not to have been executed in accordance with the statute.

Wherever the name of a testator appears, whether in the body or at the end of a will, it must have been written with intent to execute it, otherwise it is without force. When a testator, or the maker of a contract, subscribes it at the end and in the manner in which legal instruments are usually authenticated, a presumption arises that the signature was affixed for the purpose of creating a valid instrument. But when the name is written near the beginning of the document, where, as a rule, names are inserted by way of description of the person who is to execute it, and rarely as signatures, it must, before it can be held to have been inserted for the purpose of validating the instrument, be proved to have been written with that intent.

The record contains no evidence tending to show that Mrs. Booth, directly or indirectly, by word or gesture, referred to her name in the first line of the paper as her signature, nor is there evidence of any act on her part from which it might be inferred that the name there written was intended to be in execution of a completed will, and her simple declaration to Mamie Clifford, one of the subscribing witnesses: "This is my will; take it and sign it," standing alone, is insufficient to sustain a finding or verdict, that the name "Cecilia L. Booth," written by her in the first line of the document, was there written with intent that it should have effect as her signature in final execution of a will.

We are referred by the learned counsel for the appellant to *In re* Higgins (94 N. Y. 554); *In re* Phillips (98 Id. 267); *In re* Hunt (110 Id. 278), in which it was held that when a testator subscribes a will at the end and exhibits it and the signature to the subscribing witnesses, declares it to be his last will and testament and requests them to sign it as witnesses, it is a sufficient acknowledgment of the signature. Those cases are quite different from the one at bar, in this: The signatures having been subscribed at the end, in the usual way in which instruments are finally authenticated, the legal presumption arose that the signatures were written for the purpose of finally executing the documents, but as we have before shown, there is no legal presumption arising from the face of this instrument that the name was written as a signature, nor is there

evidence outside of the paper from which such an inference can be safely drawn. It has been the object of the statutes of the various States prescribing the mode in which wills must be executed, to throw such safeguards around those transactions as will prevent fraud and imposition, and it is wiser to construe these statutes closely, rather than loosely, and so open a door for the perpetration of the mischiefs which the statutes were designed to prevent.

The judgment and orders appealed from should be affirmed, with costs, payable out of the estate.

All concur.

Judgment affirmed.

(*b*). *Position specified by Statute.*

SIGNATURE "AT THE END" OF THE WILL.

Matter of Jacobson.

SURROGATE'S COURT, NEW YORK COUNTY, NEW YORK, 1887.

(6 Dem. 298.)

Application for probate of decedent's will.

Rollins, S.—I am satisfied, by the testimony submitted in this proceeding, that the paper propounded for probate as the will of Dorothea Jacobson was signed by her in the presence of the subscribing witnesses; that those witnesses severally appended their names to such paper at her request, and that, in their presence, she declared it to be her will. It is, however, contended that probate should be denied because the signature of the testatrix is not at "the end" of the instrument, as required by law.

Upon examination of the alleged will, it appears that the signatures of the witnesses are below the signature of the decedent, and that, underneath them all, appear the words: "William Wolff to be executor. Witness Dr. Harris, Mrs. Abrahamson and Mr. Goldberg." When this was written, or by whom it was written, the testimony does not clearly disclose. There is no appointment of an executor in the body of the instrument, and if in fact the words above quoted were inserted before execution, they must be considered as a part of a pretended testamentary paper, which is invalid for the reason insisted upon by the contestant's counsel. If, on the other hand, the words in question were not upon the paper

at the time it was signed and published, its validity has not been destroyed by their subsequent insertion.

Further evidence may be offered in this regard, before the final determination of this controversy.

[See also Glancy v. Glancy, 17 Ohio St. 134; Appeal of Wineland (Penn.), 12 Atl. R. 301; Sisters of Charity v. Kelly, 67 N. Y. 409 (415); Matter of Hewitt, 91 N. Y. 261; Younger v. Duffie, 94 N. Y. 535; Matter of Conway, 124 N. Y. 455; Matter of O'Neil, 91 N. Y. 516; Brady v. McCrosson, 5 Redf. (N. Y.) 431.

SIGNATURE "AT THE END" OF THE WILL.

Conboy, appellant, v. Jennings et al.

NEW YORK SUPREME COURT, 1873.

(1 T. & C. 622.)

Appeal from decree of surrogate of New York County denying probate to will of John Jennings.

Fancher, J.—This is an appeal from a decree of the surrogate of New York refusing to admit to probate a paper alleged to be the will of John Jennings, deceased. The paper was written on three pages of note or letter paper. At the end of the second page the testator and the witnesses subscribed their names. The third page contained a sentence addressed to the appellant, which was subscribed by the testator. The surrogate treated the whole three pages as one instrument, and decided that one page could not be rejected while the other two pages were left to stand as the will. He has not assigned any reason for such a conclusion. The entire paper reads as follows:

"CITY AND COUNTY OF NEW YORKE.

In sound mind and proper since in the name of God I make this Will. I will two thousand dollars to my sister, Mrs. Conboy, and seven hundred dollars to John Kindregan, my wife's brother, if he dies before he can get the money, his three childer may get it, that is, Mick, James and Kate. I also lave six hundred dollars to Celia, Mrs. Lorkin, and if she is ded he childer may get the money, equel share, and twinty pounds to Bridget, Mrs. Madin, and if she is ded her son Patrick or childer may get it. I also lave fifty dollars to Bishup McClusky for the new Catheral, and fifty dollars to the

Bishup of Brookly for the new Catheral, and fifty dollars to the Fathers in Howbuckin for there nue church, and fifty dollars to the sisters, them that is in most need of it. I give full pour and a-thority and controle to sell my property in Brooklyn to my sister Mrs. Conboy, and to receive the rent of it, House No. 865 Pacific street, Brooklyn.

With good since and sound mind I make this will the tenth day of January eighteen hundred and seventy-three 1873. JOHN JENNINGS.

Witness by us this 10th day of January, 1873. } PETER DALY, THOMAS H. DAVEY.

Margret if you get five thousand dollars for the house you will give three hundred dollars to Delia and three hundred dollars to each of the Margrets. JOHN JENNINGS."

It appears that the testator had written with his own hand the three pages, and had signed his name in two places, to wit: At the end of the second page after the date of the paper, and, also, at the end of the third page, after the remark or request to Margaret. Such signatures had already been written when the witnesses attended, and the will was published and attested. There is evidence in the form of the paper, and especially in the wording and date of it, that the testator intended the first two pages to be his will, and the residue to be a request to Margaret. There is nothing in the paper itself, nor in the facts proved, that necessarily establishes another intention. In point of fact as well as law, the first two pages have all the requisite formalities and dictinctness of a will. The paper from the beginning to the end of the two pages where the testator first signed it, and where the witnesses also signed their names to attest its execution, is a sufficient will. Moreover, the circumstance that the testator closed the first two pages with the date of the instrument and, with his signature, is evidence that he intended his will to conclude at the end of the first two pages of the paper. The witnesses concurred in that purpose, by signing their names, as witnesses, to an attesting memorandum at the end of the second page, nearly opposite the signature of the testator. The inference would be that his will ended there.[1]

[1] McGuire v. Kerr, 2 Bradf. 256.

There is no necessary connection between the remark to Margaret contained in the third page of the paper, and the will itself written on the first two pages of the paper. The unattested sentence on the third page does not therefore affect the sufficiency or the validity of the attested will, and is not part of it. Owens v. Bennett, 5 Harr. (Del.) 367; Carle v. Underhill, 3 Bradf. 101; In the goods of Taylor (9 E. L. & E. 582), 15 Jur. 1090; In the goods of Giles Davis, 3 Curteis 748; In the goods of Mary Jones, 4 Notes of Cases 532; Tonnele v. Hall, 4 N. Y. 140.

It is objected that the signature was not acknowledged. The testator produced the paper to which he had already affixed his signature and requested the witnesses to attest it. It was read over at his request, and he declared it to be his will. It was said by the learned judge in Baskin v. Baskin, 36 N. Y. 419, that there could be no more unequivocal acknowledgment of a signature thus affixed, than presenting it to the witnesses for attestation, and publishing the paper so subscribed as his will. See, also, the cases there cited.

We think the paper propounded as the will of the testator down to, and including his first signature, and the signatures of the witnesses, was sufficiently proved before the surrogate as the last will and testament of John Jennings, deceased, and that the same should have been admitted to probate.

The decree of the surrogate should be reversed with costs chargeable on the estate; and an order be made that the surrogate admit to probate that portion of the paper as the will of the testator above specified.[1]

Ingraham, P. J., and *Barrett*, J., concurred.

Ordered accordingly.

SUBSCRIPTION.—LOUISIANA LAW AND ITS SOURCES.

Succession of Miss Aglaé Armant.[2]

LOUISIANA SUPREME COURT, 1891

(43 La. Ann. 810.)

The opinion of the court was delivered by

Fenner, J.—"Testament d'Aglaé Armant." Such is the cap-

[1] This case is referred to in the opinion in Sisters of Charity v. Kelly, 67 N. Y. 409 (416).

[2] This case is here given chiefly to call attention to the sources of the Louisiana law and the fact that its history is peculiar.

tion appearing at the beginning of an olographic writing containing testamentary dispositions and offered for probate as a will, but without any signature at the end; and the question is, does this caption import a signature as required to an olographic testament? Before the adoption of the Napoleon Code an ordinance of Louis XV. provided that olographic testaments should be "entirely written," dated and signed in the handwriting of him or her making them.

Under this provision the jurisprudence of France required, in the language of Pothier, that "la signature doit être à la fin de l'act, parcequ'elle en est le complément et la perfection; c'est pourquoi un *post scriptum* après signature est nul, s'il n'est pas aussi signé." Poth. Don. and Test., Chap. I., Art. 2, Sec. 2. Thus interpreted, the same provision passed into the Napoleon Code. The commentators on the Code and the French tribunals have uniformly adopted the same interpretation. The only exception made (and that by a divided opinion) is that the *date* may follow the signature, and that words written after the signature which are superfluous may be disregarded. Thus in the case of Veuve Guyot, the will ended thus: "Fait par moi Pauline d'Espinose Veuve Guyot, qui ai signé après la lecture et méditation." The court maintained the will on the ground that the name was intended as a signature, and that "the two lines which follow the signature can have no influence on the form of the testament, which was perfect when they were written." Jour. du Palais, 20 Apr. 1812. It is useless to cite the French commentators; they all agree that testamentary dispositions following the signature are invalid.

The following is a summary of the French doctrine and authorities as given by an annotator of the Code: "Although the natural place of the signature be at the end of the act, because it expresses the final approval given by the testator to the dispositions of his last will which he has made, it is, however, admitted that the writing by the testator of his name toward the end of the act may be considered as a signature if it is placed after all the dispositions constituting the testament. It does not matter that after the name there may follow some words connected with it, if the words thus following are superfluous or useless," quoting: Cassation, 20 April, 1813; Merlin Rep. Verbo Signature, Sec. 3, Art. 7; Toullier on

Art. 970 Fr. Code; Marcadé on Art. 970 Fr. Code; 4 Demante No. 115; 4 Massé and Vergé, p. 96, Sec. 438; 7 Aubry and Rau, p. 108, Sec. 668; Vazeille on Art. 970, No. 4; 2 Grenier and Bayle, No. 228; 4 St. Espes-Lescot, No. 1010; 21 Demolombe, No. 114; Coin Delisle, Art. 970, No. 42; 3 Troplong, No. 1494; 13 Laurent, No. 227. See also Cross on Successions, who takes the same view.

Marcadé, who is as liberal as any, in commenting on a testament ending thus: "Fait et signé par moi Michel Francois, Falla, le 20 Dec. 1809," says: "The question must be determined according to the circumstances of fact. If the names are accompanied with the ordinary paraph of the party; if, having no paraph, the party has taken care to write the name in more pronounced character than the rest of the writing; if the name, though written in like character, is that of a party whose acts generally have been signed in ordinary writing, and by placing the name in the body or the concluding phrase, one might say that it was a signature, and that the testament was valid. But if, on the contrary, the name thus written was without a paraph and in no manner distinguished from the rest of the writing, and comes from a party who has always attached to his acts an independent signature, one would say this was not a signature." 4 Marc. p. 10. Applying these tests, we find that the name of this testatrix is written without a paraph, though the evidence shows that she usually, but not universally, employed one; that the name is written without any distinctive characteristics, and that, as appears from every document produced, she invariably attached an independent signature at the end. Moreover, it seems to us that the coupling of the "d" with the name, in itself excludes the idea of its being intended as a signature.

Thus, under French jurisprudence, this will would fail to stand for two reasons; (1) because the writing of the name was not *intended* as a signature; (2) because, whether so intended, or not, the signature was not at the end of the act.

This jurisprudence was extant and well established when, in 1825, the article of the French code was copied into our own. We think it to be a fair presumption that the framers of our Code, familiar with the interpretation of the same language, both prior to and subsequent to the Napoleon code, must have intended and

expected that our own article should receive the same interpretation, particularly as it conforms to the common and customary meaning attached to the word *signature*, as well as to the definitions thereof in all standard dictionaries.

Why should we depart from it?

It is true that in interpreting a like provision of the first English Statute of Frauds, an English court held that writing the name at the beginning of the testament supplied the absence of signature at the end; and some other courts, with that subjection to precedent which characterizes that system, followed the decision. But though following it, some of the judges intimated that if it were *res nova* they would decide differently, and the doctrine was condemned by sound legists. Dr. Browne, in his work on Civil Law, and Dr. Christian, in his edition of Blackstone, criticise it severely. Browne's Civ. L., p. 278, note 16.

And such was the prevalent dissatisfaction that an act of Parliament was passed to amend the statute so as expressly to require the signature to be *at the bottom* of the testament.

We were at first much impressed with the clear proof made that the deceased *intended* this paper to be her testament. But there is no more doubt that she *intended* the invalid nuncupative codicil to be her testament. Yet, as the latter was attested by women, who are incompetent testamentary witnesses, no one claims its validity. And so if the olographic will is not signed as required by law, her intentions cannot save it.

The question is not whether she *intended* this paper to be her will, but whether it is a will clothed with the forms of law. An olograph, like every other testament, is a *solemn act*. It matters not how clearly it conveys the last wishes of the decedent, if it is not clothed with the forms prescribed, it is null.

Even apart from the name not being at the end of the testament, we think the proof does not show that she intended to sign at all. It simply shows that she did not think or know that a signature was essential. If she had known that it was necessary that the testament should be *signed*, it is impossible to conceive how, in so important a matter, she should have acted so ambiguously and so differently from the course universally pursued by her in signing other acts and documents of every description. The simple fact is she did not know a signature was necessary, and

therefore did not sign. Her mistake in this respect is unfortunate in the interests of justice, but it cannot save the will.

The remaining contention of appellant, that the testatrix had signed the will at the end of the act, and that her signature had been cut off by some third person, is so inconsistent with the one just disposed of, that it hardly lies in the mouth of appellant to urge them both. But, moreover, it is unsupported by proof and has nothing to rest on.

Judgment affirmed.

[Alfred N. Duffie, a testator, subscribed his name after the attestation clause. The question was whether the will was "subscribed at the end." The court hold that unnecessary matter, such as the attestation clause, or even entirely irrelevant matter, as, in the case supposed by the court, the Apostles' Creed, may be incorporated into a will and form part of it, if testator so chooses, and in such case the signature, though following it, will be "at the end of the will." [1]]

II. MAKING OR ACKNOWLEDGMENT OF SIGNATURE BEFORE WITNESSES.

Here also the statutes of the different jurisdictions vary among themselves. That of New York, for instance, requires that the testator shall either make his subscription in the presence of the attesting witnesses; or shall acknowledge it to each of the attesting witnesses to have been made; while under that of Virginia[2] the signature must be made in such a manner as to make it manifest that the name is intended as a signature, and moreover that unless the will be wholly written by the testator, the signature shall be made or the *will* acknowledged by him in the presence of witnesses present at the same time; and in Massachusetts[3] the signature need be neither made nor acknowledged by him in the presence of the witnesses. The various leading requirements under this head, found in all or some of the statutes of wills, may be best examined under the following division. In every instance, the particular statute involved must be considered.

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[1] Younger v. Duffie, 94 N. Y. 535.

[2] Code of Va., sec. 2514.

[3] Mass. Pub. Stat. 747, sec. 1.

(*a*). Signed in presence of witnesses.

The principles governing the interpretation of this phrase are more commonly discussed in connection with the usual analogous provision that the witnesses must sign in the presence of the testator. Statement of them may therefore be conveniently deferred until we take up the subject of signing by witnesses.

(*b*). Acknowledgment of testator's signature.

Here the testator signs the will beforehand, and, if required by the governing statute, he must then acknowledge it before the witnesses.

Illustration.

1. John Hoysradt, the testator, signed the will in the presence of one witness, subsequently acknowledged his signature to a second, and later still acknowledged it to a third. Under the terms of the New York statute above stated, this was held sufficient.[1]

2. Sometimes, however, as in the present English Wills Act, the acknowledgment must be made before two or more witnesses "present at the same time."

ACKNOWLEDGMENT OF SIGNATURE.

Baskin v. Baskin and others.

NEW YORK COURT OF APPEALS, 1867.

(36 N. Y. 416.)

Appeal from a judgment of the Supreme Court, reversing the decree of the surrogate of Yates County, rejecting the will of William Baskin, deceased. The facts are sufficiently stated in the opinion.

Porter, J.—The mere statement of the facts is decisive of the issue. The will was prepared in the presence of the testator, and under his immediate direction. It received his approval, clause by clause. The whole instrument was then read to him, and he subscribed it in the presence of the draftsman, who, at his request,

[1] Hoysradt v. Kingman, 22 N. Y. 372: followed, Matter of Potter, 33 N. Y. State Rep. 936; so, also, Grubbs v. Marshall (Ky.), 13 S. W. 447.

signed it as an attesting witness. The other witness, Mr. Wilsey, was called in from an adjoining apartment, and the testator told him he wished him to sign the will. The instrument was then on the stand at his bedside, where he had just before subscribed it. Mr. Wilsey saw that his signature was already attached; and the testator, taking the paper thus executed in his hand, in presence of both the witnesses, declared it to be his last will and testament. In compliance with his request, Wilsey then subscribed the attestation clause, which stated that the will was signed and published in the presence of the attesting witnesses. It is clear that the testator intended a complete execution of the instrument; that with this view he signed it; that he supposed he was acknowledging that he had done so, when he requested Wilsey to attest the truth of the facts stated in the certificate; and that Wilsey so supposed when he certified that he was a witness to the signature as well as the publication. The remark of the testator that "this kills the other will," would have been wholly unmeaning if he did not intend to acknowledge the signature he had affixed to the will which he held in his hand.

The *subscription* and *publication* of a testamentary instrument are independent facts, each of which is essential to its complete execution. (2 R. S. 63, sec. 40.) The requirement that the first shall be made or acknowledged in the presence of each of the witnesses who attest it, is to identify and authenticate the instrument as one subscribed by the party. The requirement of publication in presence of each, is to prevent imposition upon the testator by procuring him to execute and acknowledge a will or codicil, under pretence that it is a paper of a different nature. The two prerequisites are distinct in their nature, as well as their purpose, and an omission to comply with either is fatal to the validity of the instrument. There must be satisfactory proof of the subscription and publication of the will in the presence of two witnesses. In respect to the subscription, it is sufficient that it be either made, or acknowledged, in the presence of those who attest it. If it be unsigned, it is no will; and in that case, publication and attestation are alike unavailing. If signed by another than the testator, and the signature be purposely concealed from his view and that of the attesting witnesses, the mere publication of the instrument as his last will and testament cannot fairly be deemed an acknowledg-

ment that the unseen subscription was made by his direction. (Chaffee v. Baptist Missionary Convention, 10 Paige 85, 91; Lewis v. Lewis, 1 Kern. 220; Rutherford v. Rutherford, 1 Denio 33.)

When, however, the testator produces a paper to which he has personally affixed his signature, requests the witnesses to attest it, and declares it to be his last will and testament, he does all that the law requires. It is enough that he verifies the subscription as authentic, without reference to the form in which the acknowledgment is made; and there could be no more unequivocal acknowledgment of a signature thus affixed, than presenting it to the witnesses for attestation, and publishing the paper so subscribed as his will. (Peck v. Cary, 27 N. Y. 9, 29, 30; Tarrent v. Ware, 25 Id. 425, note; Coffin v. Coffin, 23 Id. 9, 15, 16; Nickerson v. Buck, 12 Cushing 332, 342; Dewey v. Dewey, 1 Metc. 353; Gage v. Gage, 3 Curteis 451; Blake v. Knight, Id. 547; White v. Trustees of British Museum, 6 Bing. 310.) [Matter of Phillips, 98 N. Y. 267 (273); Matter of Look, 26 N. Y. State Rep. 745 (affi'd 125 N. Y. 762); Daintree v. Butcher, 13 P. D. 102.]

The judgment of the Supreme Court should be affirmed.

All the judges concurred in the opinion of *Porter*, J., except *Parker*, J., who delivered a dissenting opinion, in which *Grover*, J., concurred.

Judgment affirmed.

[But in a case where the only request was made by a third party, in another room, and it was not clear that testator even heard the request, the fact of the request, and signing by the witness, would not involve the conclusion of an implied "declaration" by testator. Ludlow v. Ludlow, 35 N. J. Eq. 480.]

SIGNATURE NOT VISIBLE TO WITNESSES.

In re Mackay's Will.

NEW YORK COURT OF APPEALS, 1888.

(110 N. Y. 611.)

Appeal from judgment of the General Term of the Supreme Court, third department.

The surrogate of St. Lawrence County refused probate to the

will of James Mackay, deceased. On appeal to the General Term the surrogate's decree was affirmed. From the General Term judgment this appeal was taken to the Court of Appeals.

Earl, J.—The subscribing witnesses came to the dwelling-house of the deceased by previous appointment, and, while seated at his writing-desk, he said to them: "Gentlemen, what I sent for you for was to sign my last will and testament." Thereupon he took from his writing-desk the instrument offered for probate, and, laying it before the witnesses, said: "It is now all ready, awaiting your signatures." He then presented the instrument to the witness McCarrier for his signature, and he signed it, saying, as he did so, "I am glad, Father Mackay, you are making your will at this time; I don't suppose it will shorten your life any," to which he replied, "Yes, he wanted it done, and off his mind"; and then the witness Mulligan, who had joined in this conversation, signed the instrument, as a witness. At the time of exhibiting the instrument to the subscribing witnesses he told them it was his will; but he handed it to them so folded that they could see no part of the writing, except the attestation clause, and they did not see either his signature or seal.

There would undoubtedly have been a formal execution of the will, in compliance with the statutes, if the witnesses had at the time seen the signature of the testator to the will. Subscribing witnesses to a will are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it. And so it has been held in this court. In Lewis v. Lewis, 11 N. Y. 221, where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names to it, it was so folded that they could not see whether it was signed by him or not, and the only acknowledgment or declaration made by him to them, or in their presence, as to the instrument, was, "I declare the within to be my will and deed," it was held that this was not a sufficient acknowledgment of his subscription to the witnesses within the statute. In that case Allen, J., writing the opinion, said: "A signature neither seen, identified, or in any manner referred to as a separate and distinct thing, cannot in any just sense be said to be acknowledged by a reference to the entire instrument by name to which the signature may or may not be at the time subscribed."

In Mitchell v. Mitchell, 16 Hun 97, affirmed in this court in 77 N. Y. 596, the deceased came into a store where two persons were, and produced a paper, and said: "I have a paper which I want you to sign." One of the persons took the paper, and saw what it was and the signature of the deceased. The testator then said: "This is my will; I want you to witness it." Both of the persons thereupon signed the paper as witnesses, under the attestation clause. The deceased then took the paper, and said, "I declare this to be my last will and testament," and delivered it to one of the witnesses for safe keeping. At the time when this took place the paper had the name of the deceased at the end thereof. It was held that the will was not properly executed, for the reason that one of the witnesses did not see the testator's signature, and as to that witness there was not a sufficient acknowledgment of the signature or a proper attestation. It is true that in Willis v. Mott, 36 N. Y. 486, 491, Davies, Ch. J., writing the opinion of the court, said that "the statute does not require that the testator shall exhibit his subscription to the will at the time he makes the acknowledgment. It would therefore follow that when the subscription is acknowledged to an attesting witness it is not essential that the signature be exhibited to the witness." This is a mere *dictum*, unnecessary to the decision in that case, and therefore cannot have weight as authority. The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature. Otherwise imposition might be possible, and sometimes the purpose of the statute might be frustrated. We think, therefore, that probate of the will was properly refused, and that the judgment below should be affirmed, without costs.

All concur.

Judgment affirmed.

III. DECLARATION OF THE WILL TO WITNESSES.

In some jurisdictions it is required that the testator shall declare the instrument in question to be his last will.[1]

[1] Mundy v. Mundy, 15 N. J. Eq. 290; Odenwaelder v. Schorr, 8 Mo. App. 458; Lewis v. Lewis, 11 N. Y. 220 (given *post*).

In other jurisdictions it is not necessary that the witnesses should know even in fact that the instrument the execution of which they are attesting is a will.[1]

(*a*). *Where declaration is not required.*

George A. Turner, a testator, did not inform the witnesses that the instrument they were signing was a will. In a suit brought to contest the will, the trial judge charged the jury that a testator must in some way communicate to the witnesses the fact that the instrument is testamentary. On appeal the court say: "Our statute [of Indiana] requires, in order to the valid execution of a will, that it shall be signed by the testator, or by some one in his presence, with his consent, and attested and subscribed in his presence by two or more witnesses. 2 G. & H. 555, sec. 18. There is nothing in this statute which requires that the testator shall make known to the subscribing witnesses that the paper which they are to subscribe is a will."[2]

(*b*). *Where declaration is required.*

DECLARATION OF THE WILL.

Lewis v. Lewis.

(1854. 11 N. Y. 220.)

Appeal from a decree of the General Term of the Supreme Court affirming a decree of the surrogate of Kings County, which denied probate to an instrument propounded as the last will and testament of Thomas Lewis.

There were two objections to the instrument. 1. That the subscription was not made or acknowledged by the decedent, in the presence of the attesting witnesses; and 2. That it was not declared by him at the time to be his last will and testament.

It appeared that the testator called the witnesses into his office and turned up enough of a paper he had there to allow them to sign and asked them to do so. He merely said: "I declare the within to be my free will and deed." The witnesses did not know

[1] Osborn v. Cook, 11 Cush. 532; Turner v. Cook, 36 Ind. 129; Canada's Appeal, 47 Conn. 450; Flood v. Pragoff, 79 Ky. 607; Brown v. McAlister, 34 Ind. 375.

[2] Turner v. Cook, 36 Ind. 129.

that the paper was a will, though one of them thought it might be because testator had that morning sent out and procured a blank will. On the question of a declaration nothing further appeared.

W. F. Allen, J. (After giving the statutory requirements, and making some preliminary statements of principle, and finding the first of the two objections sustained.)

The second objection to the probate is also well taken. To satisfy the statute the testator must in some manner communicate to the attesting witnesses at the time they are called to sign as witnesses, the information that the instrument then present is of a testamentary character, and that he then recognizes it as his will, and intends to give it effect as such. It must be declared to be his last will and testament by some assertion or some clear assent in words or signs, and the declaration must be unequivocal. (Brinckerhoof v. Remsen [8 Pai. 488; affi'd 26 Wend. 325]; Rutherford v. Rutherford, 1 Denio 33.) The policy and object of the statute re quire this, and nothing short of this will prevent the mischief and fraud which were designed to be reached by it. It will not suffice that the witnesses have elsewhere and from other sources learned that the document which they are called to attest is a will, or that they suspect or infer from the circumstances and occasion that such is the character of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they may not only know the fact, but that they may know it from him, and that he understands it, and at the time of its execution, which includes publication, designs to give effect to it as his will, and to this, among other things, they are required by statute to attest. Every fact is important in view of the position of the attesting witnesses. They should be satisfied that the instrument is in truth the last will and testament of the party, and is executed and published as such, and that he is of sound and disposing mind and memory, and in all respects competent to perform the act. The law simply prescribes those forms which it was supposed were best calculated to enable the witnesses to fulfil their office and attest the due execution of the will. The declaration that the instrument was his free will and deed, was equivocal, and would be satisfied by a deed executed voluntarily. It did not necessarily inform the witnesses that it was a will by excluding every other instrument from the mind. From

the expression they could not know that the testator did not suppose the instrument was a deed. It is a very common form of acknowledgment of the execution of a deed to acknowledge it as the "free act and deed" of the party, and the expression of the decedent varied but little from this form.

It is not probable that any wrong would be done in this case to the parties or to the intentions of the deceased to give effect to this document as a will, and although we may regret that the provisions which he designed to make for his family, and doubtless supposed he had made, must fail for the want of the prescribed formalities, the statute is quite too explicit to authorize a departure from its terms; and although it may operate with apparent harshness in this case, it is a beneficent and wise statute, and the public interests will be best subserved by a strict adherence to its provisions.

The judgment of the Supreme Court affirming the decree of the surrogate must be affirmed with costs.

Judgment affirmed.

DECLARATION OF THE WILL.

Emeline Lane as Executrix, etc., Appellant, v. Henry F. Lane, Respondent.

NEW YORK COURT OF APPEALS, 1884.

(95 N. Y. 494.)

Proceedings for probate of will of Frederick F. Lane.

Appeal.

Danforth, J.—A paper purporting to be the last will and testament of Frederick F. Lane was admitted to probate by the surrogate of Schuyler County, but his decision was reversed by the Supreme Court, and certain issues relating to its execution and the testamentary capacity of the testator were sent to a jury for trial. They have been so answered as to establish that the instrument in question was first read to or by the testator; that he understood it was his last will and testament, and so subscribed the same at the end thereof in the presence of two persons, viz.: S. B. H. Nichols and L. C. Wakelee, who at his request subscribed their names thereto as attesting witnesses; that the testator at the time was fully competent to make a will, and not disabled either in respect of his person, mind, or condition, being under no restraint or un-

due influence, and of sound and disposing mind and memory; that the making and executing of this instrument was his free and voluntary act; that at the time he "fully comprehended the effect of his act in so executing the same, and that of the subscribing witnesses thereto." But to the question whether "at the time of subscribing the paper he declared in the presence of the subscribing witnesses, and each of them, that the instrument so subscribed was his last will and testament," the jury answered, "Yes, as to Nichols; no, as to Wakelee."

The proponent upon a case and exceptions moved the Supreme Court at General Term for a new trial, and it being denied, brings this appeal. It is now stated in the printed points of the learned counsel for the respondent, that after verdict the proponent moved the judge who presided at the trial for judgment *non obstante verdicto*, or a new trial, and was denied. He claims, therefore, that the proponent should have taken an appeal from that decision to the General Term instead of going there with an original motion. No basis for this contention appears in the record before us. Therefore, it is not necessary to pass upon it. We are of opinion, moreover, that the appellant is entitled to a new trial upon the ground that the verdict of the jury in answer to the question referred to, was not warranted by the evidence. They found that the subscription by the testator was at the proper place (2 R. S. 63, sec. 40, sub. 1), and that he subscribed the will in the presence of each of the attesting witnesses; that each of these witnesses signed his name as a witness to the execution of the will at the request of the testator (sub. 4, id.), thus showing exact and formal compliance with all statutory requirements save one, viz.: that "the testator at the time of making such subscription . . . shall declare the instrument so subscribed to be his last will and testament" (sub. 3, id.). But upon the other conclusions of the jury, and the uncontradicted evidence in the record, we think this question also should have been fully answered in the affirmative. It is quite probable that the jury were led to their discriminating answer by a too close and exclusive adherence to the testimony of one witness, who said, "when Wakelee came in he did not ask Mr. Lane if that was his last will and testament, nor did Mr. Lane say 'that is my last will and testament,'" and to that of Wakelee himself, who said, "I did not ask Mr. Lane if that was his last will and testament, nor did

Mr. Lane say to me, 'Yes, this is my last will and testament.'" It was but negative evidence, and if true, was not conclusive as to the fact in controversy. The jury were also to consider the conduct of the testator, his acts, and the circumstances which he created and which surrounded the transaction. Upon all these things the proponent might notwithstanding that testimony rely and succeed.

Although publication is as essential to the validity of a will as its execution or other prescribed formality, it has never been supposed that a particular, or even any, form of words was necessary to effect it, and in Remsen v. Brinckerhoof (in the late Court of Errors, 26 Wend. 325), one of the first cases arising after the enactment of the statute, it was said that by the provision in question, "the legislature only meant there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will, and that any communication of this idea or to this effect will meet the object of the statute, that it is enough if in some way or mode the testator indicates that the instrument the witnesses are requested to subscribe as such is intended or understood by him to be his will." In the same case the word "declare" is said to signify "to make known, to assert to others, to show forth," and this in any manner, either "by words or acts, in writing or by signs"; in fine, "that to declare to a witness that the instrument described was the testator's will, must mean to make it at the time distinctly known to him by some assertion, or by clear assent in words or signs." The case itself is an example and explanation of this construction. Probate was there held impossible, because, as the court say, "not one word, or sign, or even act, passed within the hearing or presence of the witnesses at the time of the execution, tending to this effect." It was therefore a case where a testator, through imposition, might have been induced to execute a will under pretence that it was a paper of a different nature. To prevent this was the object of the statutory requirement.

The principle upon which that decision rests, and the reasoning by which it was supported, has been invariably applied in this court. (Coffin v. Coffin, 23 N. Y. 1; Trustees of Auburn Seminary v. Calhoun, 25 Id. 422; Gilbert v. Knox, 52 Id. 125; Thompson v. Seastedt, 6 Thomp. & Cook 78; affirmed *sub nom.* Thompson v. Stevens, 62 N. Y. 634; Rugg v. Rugg, 83 Id. 592;

Dack v. Dack, 84 Id. 663; *In re* Pepoon, 91 Id. 255.) It is, therefore, to be deemed settled that a substantial compliance with the statute is sufficient. [McCoy v. Empire Warehouse Co., 125 N. Y. 765.] Mitchell v. Mitchell (16 Hun 97; affirmed 77 N. Y. 596, cited by the respondent) recognizes the same principle. But in that case there was no evidence that the testator signed the will in the presence of either of the attesting witnesses, and only one saw the signature. The court thought it could not be inferred from the testimony that the testator acknowledged the signature to the other as one in fact made by him; but even as to this the court was not unanimous in opinion. That case, also, arose under a different subdivision of the statute (*supra*, sub. 2).

As to the condition now under consideration, it is well settled that the necessary publication may be discovered by circumstances as well as words (Lewis v. Lewis, 11 N. Y. 220), and inferred from the conduct and acts of the testator and that of the attesting witnesses in his presence (Thompson v. Seastedt, and other cases, *supra*), as well as established by their direct and positive evidence. Even a person both deaf and dumb may by writing or signs make his will and declare it. The testator in this case was in full possession of all his senses. He could both see and hear, and was not dumb. Partial paralysis of the vocal organs prevented him from uttering words, but he made sounds intelligible to those familiar with him, and signs which, to some extent, all could interpret. There was no difficulty with his understanding. The uncontradicted evidence shows that he set about making his will in a serious and determined manner. He went with his wife and son from his own to the house of the scrivener, Nichols, and there, Nichols says, "his wife, speaking in his presence, informed me that Mr. Lane wanted me to write his will, and I did so in his presence." As the scrivener wrote each section he read it aloud to the testator, who nodded approval each time. While writing, something was said about a witness for the will, and, says Nichols, "I suggested Wakelee, and Lane assenting, he was sent for and came." . . . . "I introduced Wakelee to Lane, and informed him that I was writing Mr. Lane's will, and we had sent for him as a witness." This was before the will was completed, and after it had occurred Nichols finished writing, and then the testator took it and read it himself. As this happened while the will was in

preparation, it is obvious that Wakelee was present when it was finished, and when the last of it was read to the testator, and also while he himself read it. The testator and both witnesses all sat at one table when the will was subscribed and witnessed. This was done by the testator immediately after reading it, and in the presence of each and both witnesses; they saw him read the will and subscribe it. He "shoved" the will to Nichols, who signed it, and then got up and Wakelee sat down "in Nichols' chair," and signed it. The testator left the will with Nichols several months, and then, by his directions, he gave it to Mrs. Lane.

From the situation of the parties, and the circumstances surrounding them, it seems to us that the jury were fully justified in saying that the testator made the required declaration to Nichols, and we think their verdict should have been the same as to Wakelee. They were present and together during both events of executing and attesting the will, and the conduct of the testator upon that occasion amounted to a declaration that the instrument was his will and testament. Such also is the meaning of the attestation clause, and this, upon such a question, may be referred to Brown v. Clark (77 N. Y. 369); Chaffee v. Baptist Missionary Convention (10 Paige 85). It is not in the usual form, but recites that "as witnesses to this last will and testament of Frederick F. Lane, we have signed our names . . . . by his request, in his presence, and in the presence of each other." The request covers the act of the parties, and embodies a description of the instrument when declaring the character in which the witnesses attest it. It is as if the testater had said, I request you to sign as witnesses to my will. Two facts are involved, a statement of the paper and a desire on his part. Such declaration may also be inferred from his conduct. He knew the paper was his will; he had directed its preparation; it was written in his presence, read to him, and read by him. He had desired Wakelee's presence to witness the will, and sitting by him, and by the other witness after signing it, passes it to one for signature, and sees first that one to whom he had declared the paper to be his will, and then the other, sign as attesting witnesses. For what purpose and with what intelligence this was done the jury have found; they say that at the time of the execution of the paper writing purporting to be the last will and testament of Frederick F. Lane, he fully

comprehended the effect of his said act in so subscribing the same, and that (*i.e.*, the effect of the act) of the subscribing witnesses thereto. They have said, moreover, that "he then understood that this paper was his last will and testament," and that the witnesses subscribed "said paper purporting to be said will, as attesting witnesses, at the request of the testator."

We find no room for doubt or mistake. The testator knew, and the witnesses understood from his acts and conduct, as he intended they should, that the instrument then executed was his will. The statute upon this point exacts nothing more, and it is not denied by the respondent that on every other there was strict compliance with its terms. We find then that the testator subscribed the will in the presence of the witnesses, made known to them its nature, and requested their attestation. On his part nothing more was required, and on their part was attestation of the will at his request. Thus every safeguard prescribed by statute against improvidence and fraud was substantially observed. . . . .

The order appealed from should, therefore, be reversed, and a new trial granted, costs to abide the event.

All concur, except *Rapallo*, J., not voting.

Ordered accordingly.

[Also McCoy v. Empire, etc. Co., 125 N. Y. 765; Denny v. Pinney's Heirs (Vt.), 12 Atl. Rep. 108; Matter of Voorhis, 125 N. Y. 765. In the case of Gilbert v. Knox, 52 N. Y. 125, the draftsman, who was also a subscribing witness, stated, in the presence and hearing of testator and the other witness, that the paper before them was testator's will, and that testator wished them to sign as witnesses. The testator said nothing, but took the will after execution, and retained it. This was held to be a due "declaration" by testator.]

ANIMUS TESTANDI.

It is obvious that although a paper is drawn up in the usual form and appears on its face to have been duly executed as a will, it may, nevertheless, represent no serious testamentary intention. The testator may, for instance, not have known, in fact, what provisions were really contained in the paper, and may not have intended to execute a will such as that in question. Or, he may have executed it merely in jest. If such a state of facts appears, the execution

lacks an element essential to the validity of a will,—namely, an *animus testandi*, an intent, on testator's part, to make a will, or the given will. But if all the statutory formalities have been observed, the fact that the will was executed in jest, or for a mere collateral use, should be clearly made out in order to warrant denial of probate.[1] And so far as concerns knowledge on testator's part of the contents of the will executed by him, this will be presumed unless facts are shown, such, for instance, as blindness, which render it incumbent on the proponent to show, in some sufficient manner, that the testator was truly informed of the provisions.

ABSENCE OF *ANIMUS TESTANDI.*

Lister and Others v. Smith and Others.

ENGLISH COURT OF PROBATE, 1863.

(3 Sw. & Tr. 282.)

In this case the plaintiffs, as executors, propounded a will of Ralph Wheeldon Smith, dated October, 1858, and a codicil thereto, dated 27th of July, 1860. Various parties were cited (s. c. 3 Sw. & Tr. 53).

SIR *J. P. Wilde* made the following remarks to the jury in summing up: The facts of the case lie in a very small compass, but the question is of great importance. It tends to make wills of any of us very insecure, if a regularly executed document, purporting on the face of it to be testamentary, can be set aside by evidence of the sort you have just heard as to the intention of the testator, that such a paper should have no testamentary effect; but I think I must leave it to you to say whether, upon the evidence, the deceased signed the codicil intending it to be an effective instrument, or whether he signed it as a mere sham. I must tell you that the presumption is that he intended it to be an effective instrument, and it is the duty of those who say it was not so intended, to make out that proposition very clearly.

The jury found by their verdict, that the deceased did not sign

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[1] Lister v. Smith, 3 Sw. & Tr. 282 (given *post*); Nichols v. Nichols, 2 Phillim. 180 (given *post*). The more detailed and strict the statutory requirements, the less, of course, will such questions be likely to arise.

the paper intending it to have any testamentary operation, and the court reserved any question as to the effect of this finding of fact upon the codicil and as to costs.

(Dec. 22.) Sir *J. P. Wilde.*—The case has been very well argued by Dr. Tristram, and the court is much indebted to him for the authorities which he has collected. It is a most remarkable case, and one which, since the trial, has given me some anxiety.

The question raised is whether a certain codicil is or is not entitled to probate. It is regularly executed by the testator, but evidence was given at the trial that the testator never intended it seriously to operate as a testamentary document. It was proved before the jury that the testator wished one of his family to give up a house which she then occupied, and that to force her to do so, he made pretence of revoking by codicil a bequest which he had made by will in favour of this woman's daughter, and that the paper in question was made with that sole object; that the testator gave his attorney instructions to prepare it with that intention, and informed him before it was drawn that he never wished it to operate at all. Further, that the attorney pointed out the folly of executing such an instrument, and would have nothing to do with its execution. It was, however, executed in the presence of the testator's brother, to whom it was then given by the testator with express directions that he was not to part with it, and that it was in no event to operate, or to revoke the bequest made in his will, but to be used only in the manner above described. Similar declarations were made by the testator at the moment of its execution.

A codicil thus duly executed in point of form, and attested by two witnesses, has been directly impeached by parol testimony. It bears all the appearance on the face of it of a regular testamentary act; but on the evidence it has been found by the jury not to have been intended as such by the testator. The momentous consequence of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act, was in reality the offspring of a jest, or the result of contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the

court should turn it into an effective instrument. And such no doubt is the law. There must be the *animus testandi*. In Nichols v. Nichols, 2 Phill. 180 [given *post*], the court refused probate to a will regularly executed, which was proved to have been intended only as a specimen of the brevity of expression of which a will was capable. And in Trevelyan v. Trevelyan, 1 Phill. 149, the court admitted evidence, and entertained the question whether the document was seriously intended or not. In both cases the court held that evidence was admissible of the *animus testandi*. And to the same effect is the authority of Swinb. pt. 1, s. 3; and of Shep. Touch. 404. The analogies of the common law point the same way. A deed delivered as an escrow, though regularly executed, is not binding. And in Pym v. Campbell, 6 Ell. and Bl., the Queen's Bench held that a regular agreement signed by the party might be avoided by parol evidence that at the time of its signature it was understood that it should not operate unless a certain event happened. There can therefore be no doubt of the result in point of law if the fact is once established. But here I must remark that the court ought not, I think, to permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury, that their verdict recognizes and expresses no degree of clearness in proof. They are sworn to find one way or the other, and they do so sometimes on proof amounting almost to demonstration, at others on a mere balance of testimony; sometimes upon written admissions and independent facts proved by disinterested parties, sometimes on conflicting oaths or a nice preponderance of credibility. And it is difficult to impress them with the enormous weight which attaches to the document itself as evidence of the animus with which it was made. This weight it becomes the court to appreciate, and to guard with jealousy the sanction of a solemn act.

In the present case, however, the court finds the evidence so cogent, that it is prepared to act on the finding of the jury that the codicil was executed as a sham and a pretence, never seriously intended as a paper of testamentary operation. But I am far from saying that the court will in all cases repudiate a testamentary paper simply because a jury can be induced to find that it was not intended to operate as such. The character and nature of the evidence must be considered, as well as the result at which a jury have

arrived, and the court must be satisfied that it is sufficiently cogent to its end. In this case the court is so satisfied, and it therefore pronounces for the will, and against the codicil; the costs to be paid out of the estate.

[In Sewell v. Slingluff, 57 Md. 537, the will, absolute on its face, was duly executed, and was intended, as shown by the oral declarations of testatrix, to take effect on one contingency, but on another contingency not to take effect. No such oral arrangement can be shown, and such a will takes effect in any event upon testator's death.]

ABSENCE OF *ANIMUS TESTANDI.*

Nichols and Nichols by their guardian v. Nichols.

PREROGATIVE COURT OF CANTERBURY, 1814.

(2 Phillim. 180.)

Application for probate.

The widow opposed the validity of the testamentary paper and prayed the court to pronounce for an intestacy.

JUDGMENT.

SIR *John Nicholl:*

This is a case under singular circumstances—the deceased died in January, 1813, leaving a widow, and two children by a former wife—the will is in these terms:

"I leave my property between my children; I hope they will be virtuous and independent; that they will worship God, and not black coats.

"July 30, 1803. "THOMAS NICHOLS.

"Witness Thomas King."

It is proved and admitted that this paper was written and signed by the deceased, and that he was of sound mind at the time; but Thomas King, a subscribed witness, gives the following account of the transaction:

"The deponent is steward to Sir Charles Mill, whose solicitor the deceased was—he knew him intimately for twenty years—when they had any business to transact together, it was their custom to dine at the house of each other. On the 30th of July,

1803, the deceased dined with the deponent—after dinner they adjourned, as usual, to the deponent's book-room, where they drank their wine, which never exceeded a pint each, with, perhaps, a glass or two of white wine. The deponent and the deceased used to talk familiarly with him on many subjects—he was in the habit of ridiculing the tautology of lawyers, who, he said, employed a vast number of unnecessary words—that having finished their wine, the deponent took from a drawer a paper which he had drawn up as his will; and, shewing it to the deceased, said something ridiculing lawyers spinning out papers, and asked him if it was not as good a will as if it had been spun out to a great length by a lawyer—the deceased replied, not only a valid will, but a devilish good one; and, asking for pen and ink, took a sheet of paper, and writing the paper propounded, threw it towards the deponent, saying, very carelessly, there, that is as good a will as I shall probably ever make.[1] These he recollects to have been the very words spoken—he did not request the deponent to take care of the paper, or say another word about it—or, from that time to his death, ever allude to it—and the deponent verily believed that he never recollected that such a paper was in existence—a very short time afterwards the deceased shook hands with the deponent, and went away, leaving the paper on the table. When the deceased was gone, the deponent wrote his name as witness to the signature (he was not requested by the deceased so to do); he then folded up the paper, wrote on the back 'the will of Thomas Nichols, Esq., of Southampton, July 30, 1803'; and put it into his iron safe, where it remained, with many other loose papers, till after the deceased's death. The deponent does not believe that the deceased, when he wrote the paper, intended to make his will, or that such paper should ever operate as such; but he always considered, and does still think, that it was written without any other view than in imitation of the paper the deponent had so shewn him—a copy of which he annexed to his deposition, and to shew the deponent he could exceed him in brevity—and the deponent is confirmed in this opinion by the practice of the deceased on other occasions; the deponent being in the habit of

[1] At the date of this will, and long afterward, wills of personal property, very informal in point of execution, were often allowed, in England, attestation and signing by witnesses not being essential. 1 Wms. on Exrs. 84, 85.

drawing specimens of leases, and other instruments, wherein very few words were used, which he shewed to the deceased; and he, upon such occasions, uniformly wrote others still shorter, by way of shewing that he could exceed him in brevity. The deponent never considered the paper as the deceased's will, but as the deceased's specimen of a short will; and as such he signed his name as a witness to it, and endorsed it, and put it in his iron safe. He further saith, that his intimacy with the deceased continued till his death in January last—that, during his illness, he visited him about once a week for five weeks together—upon those occasions, not considering the aforesaid paper as intended as a will, and understanding from the deceased that he had made no will, he was very urgent with him to make a will—the deceased's answer to such application being, that he did not know but that the law would make a better will, or as good a will, for him as he could make—but the deponent and others having pressed him to make a will, the deceased did at length, shortly before his death, say, that when he got a little better he would, to satisfy his friends, make a will; but this he did not live to do—he grew worse daily—that the deponent never alluded to the paper writing, for he had himself forgotten that such a paper was in existence."

The same witness, in answer to an interrogatory, says, "that a few days after the death of the deceased, Sarah Nichols, his widow, told the respondent she could find no will; and asked nim, as he was the confidential friend of her husband, if he had left a will in his hands. He replied, No, he never left any will with me; but added that, if it would give her any satisfaction, he would search his papers, which she requested he would do, saying, that she concluded from the intimacy that subsisted between them, if her husband had left any will, with any one, it would be with the respondent. The respondent had then no thought of the paper in question; nor did the circumstances of the same having been written occur to him, till, on turning out the various papers that were in the safe, he found it there—that the respondent thought so lightly of it when he went to Sarah Nichols, and shewed it her, that he said, this is all I have got, and you may put it into the fire. The respondent does verily believe that the deceased departed this life without the least recollection of the paper being in existence—that the deceased and his wife lived on the best

terms together, and the greatest love and affection subsisted between them."

This is the account given by the only witness, whose name is subscribed to the paper; and if this evidence can be received, and is to be credited, this is not the will of the deceased, for it wants the great requisite, the *animus testandi;* it was not written with the mind and intention to make a will. A question has been made whether this evidence can be received. I am of opinion that it can and must be received; it is the evidence of the attesting witness, who must be produced, and whose testimony is common to both parties. What credit may be due to it is another question. A witness attests a will for the purpose of giving authenticity to the *factum* of the instrument: the *animus testandi* is the very point into which the Court of Probate is to enquire—the mere act of witnessing or signing does not exclude, of necessity, the absence of the *animus testandi* any more than the mere act of cancellation excludes of necessity the absence of the *animus revocandi.* It may have been signed under duress, or under other circumstances when there was no intention to make a testamentary disposition.

The evidence is admissible, but is certainly to be received with great caution, the paper being dispositive; and the witness having signed it must be heard with jealousy to depose against the effect of his own act—it is true the attestation clause is not in the usual form; it is merely the word "witness"; but still that infers an attestation of the act of the deceased; and the witness must be carefully heard by the court.

The evidence then being admissible, the next question is, Does the court believe this account? The witness is in a respectable situation in life; wholly unimpeached in credit and character; the confidential friend of the deceased; and no possible inducement is suggested why he should declare upon oath a false account of the transaction—the account he gives, though whimsical, is neither unnatural nor improbable; the internal evidence of the paper strongly corroborates it, as do also the extrinsic circumstances—he says the deceased wrote it in order to show in how few words a will might be written—there is something of levity in the expression, "Worship God, and not black coats": it is in imitation of one written by the witness; his is in these words:

I give and devise all my property, real and personal, to Mary,

my wife, to be divided by her, as she shall think proper, between all my children, either in her lifetime or by will (reserving enough for her own comforts). I hope my children will obey their mother, love each other, and be pious and virtuous; that they worship God and not man, nor ever practise the trade of a butcher, nor ever accept of any place in the navy or army. But they will endeavour to plant and extend happiness, to raise cottages for industry and honesty, and make the desert smile with plenty and innocence; that they will despise only those who monopolize the earth for the gratification of their own luxury and pride; and that they will look up to none as their superior but those only who exceed them in good works; and never treat any of God's creatures with contempt but the proud and profligate; and never bend their knee but to their God. This is my will; and I hereby appoint my wife sole executrix thereof. In witness, &c., &c.,

Signed, *Thomas King.*

Upon comparing the two instruments, I think the one a compressed imitation of the other—the admonitory part in the one occupies twenty lines; in the other the same idea is given in more concise words. It is an extremely strong circumstance that it makes no alteration in the disposition the law would have made of his property. For what purpose could he have intended this paper? In it there is no legacy, no executor, no guardian to his children—this is a strong confirmation that it was not written *animo testandi*, but for the purpose mentioned by Mr. King—subsequent circumstances still more confirm this; the deceased afterwards married—he lived on terms of affection with his wife, and he *said he had no will, that the law would make a good will for him*—so that it was his intention that his widow should possess, after his death, the provision which the law would give her; during none of these conversations does he make any allusion to the existence of this paper—his forgetting it would not operate as a revocation; but it is a circumstance to shew that he originally never intended it as a testamentary paper. There is little doubt that when he threw it across the table, he meant it should be put into the fire.

With all the possible caution that the court can exercise where a witness is deposing against his own act, I am yet fully satisfied in

my mind and conscience that the deceased never intended this as his will; I, therefore, pronounce against it; and decree administration to the widow, her husband having died intestate.

TESTATOR MUST UNDERSTAND THE WILL.—PRESUMPTION.

Maxwell v. Hill.

TENNESSEE SUPREME COURT, 1891.

(89 Tenn. 584.)

Appeal from Circuit Court.

Caldwell, J.—This is a contested will case. In 1877, Elroy A. Hill, wife of C. A. Hill, died at her home in Rutherford County. At the time of her death she owned four tracts of land, and some little personal property. She died without child, or representative of a child, and without father or mother; but left, surviving, several brothers and sisters, and her husband. At the February term, 1878, of the county court of Rutherford County, her husband, C. A. Hill, presented a paper writing, which was admitted to probate in common form as the last will and testament of Elroy A. Hill, deceased. By this instrument, some small bequests, a saddle, and her wearing apparel, were given to her sister Sarah Maxwell and to her sister Eliza Haynes; and the residue of her personal estate and all her lands were given to her husband absolutely. In April, 1888, Sarah Maxwell, a sister of Elroy A. Hill, filed her petition in the county court to have the probate set aside. C. A. Hill answered the petition; and, proper order being made, the alleged will and proceedings thereon were certified to the circuit court, where issue of *devisavit vel non* was made up and tried by court and jury. Verdict and judgment were for the will; and, motion for new trial being overruled, Sarah Maxwell appealed in error.

The subscribing witnesses to the paper propounded as the will were W. J. Hill and O. W. Hill, brothers of C. A. Hill. The former of these died before the trial in the circuit court, and because of his death, his handwriting and signature were properly allowed to be proved by other witnesses. Mill & V. Code, secs. 3012, 3018; Caruth Lawsuit (Martin's Ed.), sec. 612; Stump v. Hughes, 5 Hayw. (Tenn.) 93; Den v. Mayfield, Id. 121; Crockett v. Crocket, Meigs 95; Jones v. Arterburn, 11 Humph. 97; Har-

rel v. Ward, 2 Sneed 611; Alexander v. Beadle, 7 Cold. 126. C. A. Hill, the principal beneficiary under the alleged will, also died before the trial, intestate, and without children or child, or representative of either. O. W. Hill is one of his heirs; hence, when he went on the stand to prove the execution of the will as one of the subscribing witnesses, his evidence was objected to by the contestant, on the ground of interest. His evidence was admitted, and the action of the trial judge in that behalf is here assigned as error. The witness was competent, and his evidence was properly admitted. The statute relating to this question provides that "no last will or testament shall be good or sufficient to convey or give an estate in lands, unless written in the testator's life-time, and signed by him, or by some other person in his presence, and by his direction, and subscribed in his presence by two witnesses, at least, neither of whom is interested in the devise of said lands." Mill & V. Code, sec. 3003. O. W. Hill was manifestly not "interested in the devise of" the lands of the testatrix, though made to his brother. To have been so, in the sense of the statute, he must have been a beneficiary under the devise. He had no interest in the devise at the time he witnessed the will, nor has he any now. His interest in the land now is as heir of his brother, and not as devisee under the will. At that time he was not even heir of his brother, for no one can be heir of a living person. This construction of the statute is in accord with Allen v. Allen, 2 Overt. 172, and Walker v. Skeene, 3 Head 1, 5.

Elroy A. Hill was an illiterate person, and made her mark to the supposed will. At the time it was executed, she was about 55 years of age, and in rather feeble health. Her husband was both draftsman of the instrument and almost the sole beneficiary thereunder. As applicable to these facts, in connection with what occurred when the paper was executed, and before and afterwards, the court instructed the jury as follows: "You must further be satisfied that she was fully apprised of the contents of the will; that it was read over to her, and that she understood the same; also that it was her free and voluntary act, free from fraud or coercion on the part of her husband. You must also find that she was of sound mind and disposing memory at the time of making the will; that she knew her property, her relatives, and those having claims to her bounty; and had mind to intelligently dispose

of said property. When a beneficiary under a will is the draftsman of the will, it is a strong circumstance against it, and it devolves upon the plaintiff to show that everything was fair and free from fraud and undue influence.[1] When a party makes his or her mark to a will, it is not enough to show that the will was duly executed, but it must also be shown that the testator was fully cognizant of the contents of the will, and approved it." Appellant assigns error on this charge, and insists that it is fatally defective, because the jury were not told that "information acquired from the draftsman in such a case as this is not sufficient," and that, under the circumstances of this case, the proof should be equivalent to having heard the will read over by a disinterested person. In ordinary cases, when the testator is shown to be of competent capacity, and there are no circumstances of suspicion surrounding the case, it is not necessary to establish by proof that he had knowledge of the contents of the will. Such knowledge will be presumed where formal proof of execution and testable mind are shown, and no opposing facts appear. Cox v. Cox, 4 Sneed 87; Bartee v. Thompson, 8 Baxt. 513; Patton v. Allison, 7 Humph. 332; Rutland v. Gleaves, 1 Swan 200; 1 Greenl. Ev., sec. 33; 1 Jarm. Wills, 46. But where the person making the will is so illiterate as to make his mark, and the draftsman of the will is the principal beneficiary, the presumption of knowledge is overcome, and more proof is required to establish the will. Such circumstances cast a suspicion on the will, and it becomes incumbent on the proponent to remove that suspicion by showing affirmatively that the testator fully understood the provisions of the will, and fully approved them. Such is the rule deducible from the following authorities: Patton v. Allison, 7 Humph. 332–335, and citations; Rutland v. Gleaves, 1 Swan 200; Bartee v. Thompson, 8 Baxt. 513; Key v. Holloway, 7 Baxt. 575; Wisener v. Maupin, 2 Baxt. 342; Cox v. Cox, 4 Sneed 87; Watterson v. Watterson, 1 Head 2. In Rutland v. Gleaves, *supra*, the testatrix was old and feeble, and had for several years been addicted to the excessive use of opium and ardent spirits. The will, which was complicated in its provisions, was read to her, partly by the witness, and the balance by another person, who was the principal legatee, after which the latter held her hand, and she made her mark to it.

[1] Compare, on this point, Post v. Mason, given *ante*.

"The court, among other matters not excepted to, instructed the jury that if they believed the will was read to the testatrix correctly, and that she was of sound mind, the legal presumption would be that she understood its contents." This instruction was held to be erroneous, because it precluded the jury from considering all the facts and determining from them whether or not the testatrix understood the contents of the will. 1 Swan, 200. In the 7 Humph. case the court told the jury "that, when a party writes a will in his own favor, this circumstance should awaken the vigilance and jealousy of the jury to see whether a knowledge of its contents was brought home to the deceased, for in such case, it is incumbent on the propounder to show that the contents were known to the testator." This was held to be a correct statement of the law. 7 Humph. 332. In Cox v. Cox the testatrix was shown to be so illiterate that she could neither read nor write. She was also very old when the will was executed, and was by the witness seen to "make her mark" to it. As to the rule of evidence in such a case this court said: "The existence of the fact that the testator cannot read, the law regards as a circumstance not only sufficient to excite suspicion, but to repel the presumption of knowledge of the contents of the will. It may be of more or less force, according to the facts of each particular case, and the degree of proof requisite to remove such suspicion, and to establish the knowledge of the testator, must necessarily depend upon the circumstances of each case. All that in reason can be necessary is that it shall be made to appear, to the entire satisfaction of the jury, that the testator fully understood and assented to the provisions of the will." 4 Sneed, 88. In the Watterson case the testatrix was unable to write or read writing. She had two sons. One of these wrote the will by which almost her entire estate was given to himself. Judge CARUTHERS, delivering the opinion of the court, said there were two grounds of suspicion and distrust: The illiteracy of the testatrix; and the fact that the will was written by the principal legatee. And in the conclusion of his discussion of the charge of the trial judge, with respect to the evidence required in such a case, he uses this language: "But we think there is no inflexible rule of law that the knowledge of the contents, which is required to be established in the case of persons who cannot read, or where the writer of the will gets a large benefit under it, can

only be derived from hearing the will read, to be proved either by direct or circumstantial evidence; but all that is necessary is that it must appear to the full and entire satisfaction of the jury that the testator fully understood and fully assented to the provisions of the will. This fact, as to the kind and description of proof, may be made out like any other disputed fact. But, in case of this description, the strength and conclusive character of it must depend upon the degree of suspicion which the circumstances are calculated to excite, and should be strong and convincing,—equivalent, at least, to the reading of the will, or hearing it correctly read." 1 Head, 6, 7. None of these cases, nor any other authorities of which we are aware, warrant the instruction which appellant insists should have been given. The headnote in the Watterson Case is misleading in that it states that the evidence of the testator's knowledge, in suspicious cases, shall be "equivalent, at least, to having heard the will read by a disinterested and unimpeachable party," when the language of the opinion is that such evidence should be "equivalent, at least, to the reading of the will, or hearing it correctly read." A party who is neither disinterested nor unimpeachable might "correctly read" the will. Whether he has done so in a given case is a question for the jury. In all cases of illiteracy on the part of the testator, and of great benefit to the writer of the will, the controlling idea, beyond the ordinary proof of formal execution and testable capacity, is that the testator must have fully comprehended the provisions of the will and fully given his assent thereto. To show this affirmatively the burden is upon the proponent. It may be shown by any competent evidence, direct or circumstantial, which is sufficient in weight and cogency to remove all suspicion and satisfy the jury of the fact.

The instruction given in this case comes fully up to the rule in every respect. Summarized on this point, it is that to find in favor of the will the jury must be satisfied that the testatrix was fully apprised of its contents. "That it was read over to her, and that she understood the same"; that she "was fully cognizant of the contents of the will, and approved it." Not only was the charge given full, and as favorable to the contestant as it could have been within the law, but the instruction suggested for the first time in the assignment of errors is not sound. But if the charge were not full (being correct as far as it goes), and the in-

struction suggested were entirely sound, the failure to give it would not be reversible error. To be so, it must have been asked in the form of an additional instruction in the court below. Mere meagreness in a charge is not ground for reversal. Sutherland v. Shelton, 12 Heisk. 375; Railroad Co. v. Jones, 9 Heisk. 27; Overton v. Bolton, Id. 762; Sommers v. Railroad Co., 7 Lea 201; Railroad Co. v. Gurley, 12 Lea 46; Mayor, etc. v. Bell, Id. 157; Oil Works v. Bickford, 14 Lea 651; Railway Co. v. Wynn, 88 Tenn. 332, 14 S. W. Rep. 311; Railway Co. v. Foster, 88 Tenn. 671, 13 S. W. Rep. 694, 14 S. W. Rep. 428; Railway Co. v. Hendricks, 88 Tenn. 710, 13 S. W. Rep. 696, 14 S. W. Rep. 488; Watterson v. Watterson, 1 Head 6; Mann v. Grove, 4 Heisk. 403; Railroad Co. v. King, 6 Heisk. 269.

Finally, it is assigned as error, and contended in argument that "there is no testimony in the record to justify the finding of the jury." Several witnesses say they heard the testatrix state, at numerous times before the execution of her will, that she desired her husband to have her land for life, with remainder to her brothers and sisters. Others state, with equal certitude, that they heard her say, before the date of the will, that she wanted him to have it absolutely, and did not want her "folks" to have any interest in it. Some of the witnesses testify that she told them, after its date, that she had made her will, giving her property to her husband. That he was kind and affectionate to her is sufficiently shown. There is some evidence tending to show that she was not on good terms with her own people, and that they had been unkind to her, and, on the other hand, there is evidence tending to show that this is not true. Her declarations were competent to be considered by the jury in determining whether she fully comprehended and approved the will as written.[1] Beadles v. Alexander, 9 Baxt. 604; Linch v. Linch, 1 Lea 526. If it be found that she did, then, of course, the will and not her verbal statements must control the course of her property. We notice, more in detail, the testimony of O. W. Hill, one of the subscribing witnesses. He says: "I went to her house, and went in. Her husband was out of the room. She picked up a paper and said it was her will, told

[1] Compare the cases given *ante* on "Declarations," and see Index under the same head.

me she had signed it, and showed me her mark. She said she had willed my brother everything she had except side-saddle and some clothing. I witnessed the will. This is the will [being shown the original will on file]. When I first went there she was in the house. My brother Rit. [C. A. Hill, her husband] came in after I got there, before I witnessed the will. He took the will up and read it in the presence of myself and Elroy Hill, at my request. I never sign anything without having it read. The will read over was the same as what she had told me. I know C. A. Hill's handwriting. This will was in his handwriting. I said to her that it looked like some one else ought to have written it. She said my brother always done her writing and could do that. He did writing for her both before and after they were married," etc. If this witness speaks the truth [his credibility was peculiarly a question for the jury], there can be no doubt that the testatrix understood and approved the will. She told him before it was read in their joint presence what it contained, and when he heard it read he found it the same as she had previously told him it was, and, when the will is produced in court, it is seen to be what she told him it was, and as it was read to them by the defendant. Altogether, the verdict is abundantly sustained. Let the judgment be affirmed, with costs.

[Concerning the presumption, arising from apparently regular execution, that testator knew the contents of the will, see also 1 Wms. on Exrs. 350, note (*x*); Beall v. Mann, 5 Ga. 456; Smith v. Dolby, 4 Harring. 350; Hoshauer v. Hoshauer, 26 Penn. St. 404.]

IV. REQUEST TO WITNESSES TO SIGN.

In some States the witnesses must be requested by the testator to sign.[1] In others this is not required in terms by the statute,[2] but presumably, even in that case, they must sign with his assent and knowledge.[3] Even where a request is essential, it need not be made in so many words. Any act or conduct on testator's

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[1] 2 N. Y. R. S. 63, sec. 40, subd. 4, Birdseye's Ed. 3343, sec. 8, subd. 4; Cal. Civ. Code, § 1276; Ark. Dig. sec. 6492.

[2] Ayres v. Ayres (N. J.), 12 Atl. Rep. 621.

[3] Allen's Will, 25 Minn. 39.

part at the time that clearly constitutes a manifestation on his part of a desire to have the witnesses sign, will suffice.[1]

Illustration.

Amos Knox, the testator, signed the will in presence of the witnesses. Colin, the draftsman, and a witness then said, in the presence of testator and witnesses, that "it was necessary that testator should request us to sign as witnesses, and therefore I said that that was Mr. Knox's will, and he wished us to sign it as witnesses." The testator made no dissent, and when the witnesses had signed the will he took it into his possession and thereafter retained it. This constituted a valid "request."[2]

IMPLIED REQUEST TO WITNESSES.

Coffin v. Coffin.

NEW YORK COURT OF APPEALS, 1861.

(23 N. Y. 9.)

Application for probate of an instrument purporting to be the last will and testament of Trustrum Coffin, deceased. The surrogate of Dutchess County refused probate, and his decision was affirmed at General Term in the second district. Appeal to the Court of Appeals.

Several objections to the will were urged by the contestants.

Comstock, Ch. J. [After disposing of other objections and finding them insufficient.]

In the next place, as to the attestation. The statute requires two witnesses, each of whom must sign his name at the end of the will, at the request of the testator. Confining ourselves to the evidence of these two witnesses, the facts appear to be these: They were present at the testator's house on the day in question, by his own procurement, and for the purpose, as there is reason to believe, of witnessing his will. When the instrument was ready for execution and attestation, they were summoned to the room where the matter was transacted. They came there, saw the testator subscribe his name, and signed their names as wit-

[1] Peck v. Cary, 27 N. Y. 9; Coffin v. Coffin, 23 N. Y. 9; Higgins v Carlton, 28 Md. 115 (141); Estate of Crittenden, Myr. Prob. R. (Cal.) 50; Rogers v. Diamond, 13 Ark. 474.

[2] Gilbert v. Knox, 52 N. Y. 125

nesses. Before doing so, one of them asked the testator if he requested him to sign the will as a witness; to which he answered in the affirmative. Both the witnesses then proceeded to sign; the draftsman denoting the place where their names were to be written. The testator, the draftsman, and the witnesses were all at one table, and in close proximity to each other. The request to attest the will was in answer to the question thus put by one of the witnesses, and no other or different communication was made to the other. Taking this as substantially the true statement of the facts, the objection which has been urged is, that one of the witnesses attested the instrument without any request made by the testator. Now, the statute, it is true, declares that each witness must sign on such request. But the manner and form in which the request must be made, and the evidence by which it must be proved, are not prescribed. We apprehend it is clear that no precise form of words, addressed to each of the witnesses at the very time of the attestation, is required. Any communication importing such request, addressed to one of the witnesses in the presence of the other, and which, by a just construction of all the circumstances, is intended for both, is, we think, sufficient. In this case both the witnesses, by the direction or with the knowledge of the testator, were summoned to attend him for the purpose of witnessing his will. They came into his presence accordingly, and in answer to the inquiry of one of them, in which the singular instead of a plural pronoun was used, he desired the attestation to be made. In thus requiring both the witnesses to be present, and in thus answering the interrogatory addressed to him by one of them, we think that he did, in effect, request them both to become the subscribing witnesses to the instrument. Any other interpretation of his language, and of the attending circumstances, would be altogether too narrow and precise.

[Here the court consider and overrule one other objection.]

On the whole, we are of opinion that the judgment of the Supreme Court and the sentence of the surrogate must both be reversed, without costs of the litigation to either party, and the proceedings remitted to the surrogate, with a direction to admit the will to probate.[1]

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[1] Also Lane v. Lane, 95 N. Y. 494.

Lott, J., took no part in the decision; all the other judges concurring.

Ordered accordingly.

V. ATTESTATION AND SIGNATURE BY WITNESSES.

As a general proposition our statutes require that the will must be signed by attesting witnesses. The statutes vary very much, however, among themselves, and the statute in question must in every given case be consulted. There are, nevertheless, certain leading requirements which are to be found in all or many of the statutes, and these will now be taken up in order. And in the first place attention may be called to the distinction between attesting and signing. "Attestation is the act of the senses: subscription [or signing] is the act of the hand."[1]

(1). SIGNING.

The usual and appropriate method is of course for the witness to write out his name. But as in the case of a testator, other methods, intended to effect what shall stand for or represent a signature, will suffice.

Illustrations.

(*a*). *Signature by mark.*—A witness signed by making a mark. This was sufficient.[2] The fact that a mistake is made in the name written around the mark, as "Elizabeth Cummins" for "Elizabeth Sharpe," does not invalidate it.[3]

(*b*). *Signature by descriptive term.*—At the execution of the will of Charles R. Sperling, the solicitor directed one of the witnesses, Thomas Saunders, to sign "as servant to Mr. Sperling." He accordingly, misunderstanding the direction, wrote not his name, but merely the words "servant to Mr. Sperling." He intended the words for a signature. Sir J. P. WILDE: "I think there is a sufficient attestation and subscription. I am satisfied that Saunders wrote the words which appear on the will, intending thereby an identification of himself as the person attesting."[4]

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[1] Swift v. Wiley, 1 B. Mon. (Ky.) 144.

[2] Pridgen v. Pridgen, 13 Ired. L. (N. C.) 259.

[3] In Goods of Ashmore, 3 Curt. 756.

[4] In Goods of Sperling, 3 Sw. & Tr. 272.

(c). WRONG NAME.—WHEN NOT SUFFICIENT.

Ex parte Leroy.

SURROGATE'S COURT, NEW YORK COUNTY, NEW YORK, 1855.

(3 Bradf. 227.)

Bradford, S.—The will propounded for proof, reads as follows:

February 23d, 1855.

All my money and property belong to my wife and children. My last will. LOUIS LEROY.

Before JOHN BOWERS.

JOHN BOWERS.

It appears that Charles Bowers, the son of John Bowers, wrote this paper at the request of the deceased, and then signed his father's name as a witness, because the latter could not write very well, and he did not suppose he was going to sign. The father, however, did subscribe his own name. Charles was not requested to become a witness, and did not, in fact, sign his own name, not supposing more than one subscribing witness necessary. The statute requires each of the attesting witnesses to "sign his name as a witness." Charles did not sign his name, and the signature of his father's name cannot be taken as a substitute. It is not a case of mistake, there having been no intention to have more than one subscribing witness. I think, therefore, the execution was defective, and that the will must be rejected.

(*d*). *Intention necessary to signature.*—A witness wrote his full name, Fred. Wm. Nap. Wilson. It was admitted that this signature itself was made at the wrong time, and did not count as a valid signing. Reliance was placed on the fact that thereafter the testator duly acknowledged his will and signature in the presence of Wilson and another witness, Dr. White, that the latter signed his name, and that then Wilson, noticing that he had failed to cross the F in his first name, when writing it before, crossed it and added the date. It was claimed that crossing the F constituted a signature. But it was held not so. A mark, to constitute a signature, must be *intended* as such. Here it was only intended to correct an error in the former writing, and was not meant as a new signature.[1]

[1] Hindmarsh v. Carlton, 8 H. L. C. 160.

(*e*). SIGNATURE BY INITIALS.

In the Goods of Hood Hanway Christian, Esq., deceased.[1]

PREROGATIVE COURT OF CANTERBURY, 1849.

(2 Roberts. 110.)

H. H. Christian, Esq., a Rear Admiral in the Royal Navy, died on the 31st Aug., 1849, leaving a will and a codicil bearing date the 14th February, 1848. The will was signed by the testator and the witnesses in the usual form. Immediately after execution a short codicil was added and duly signed by the testator, and to this the witnesses signed their initials only.

JUDGMENT.

SIR *Herbert Jenner Fust:*

I have before me the affidavit of one witness only; in such an extraordinary case all the witnesses ought to have joined. The attesting witnesses to the so-called codicil have affixed their *initials* only; however, I have no doubt in the matter, though I believe this is the first instance under the act of the witnesses so signing. I am not aware that the witnesses can be required to sign their *names;*[2] I am of opinion that there is a sufficient subscription on their parts, and therefore I decree probate as prayed.

(*f*). *Subsequent acknowledgment by witness.*—As a general proposition, the signing by the witnesses must be complete and sufficient in itself when made, and subsequent acknowledgment of their signatures by the witnesses will not suffice.[3] But in some jurisdictions a subsequent acknowledgment may establish them as sufficient.[4]

(*g*). *Signing personally or by another.*—In some States, witnesses must sign their names personally, and cannot delegate another to sign for them.[5] While in others they may request another to sign for them, and do no manual act themselves, and this may suffice.[6]

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[1] To the same point, Jackson v. Van Dusen, 5 Johns. (N. Y.) 144.

[2] Compare the New York Statute, given in Appendix, *post.*

[3] Matter of Downie's Will, 42 Wis. 66.

[4] Sturdivant v. Birchett, 10 Gratt. (Va.) 67.

[5] Duffie v. Corridon, 40 Ga. 122, based on an express provision of the statute.

[6] Lord v. Lord, 58 N. H. 7; Upchurch v. Upchurch, 16 B. Mon. (Ky.) 102; Jesse v. Parker, 6 Gratt. (Va.) 57.

(*h*). BOTH SIGNATURES WRITTEN BY ONE WITNESS

Matter of Strong.

SURROGATE'S COURT, WESTCHESTER COUNTY, NEW YORK, 1891.

(39 N. Y. State Rep. 852.)

Proceeding for probate of an instrument purporting to be the will of Eliza Strong, deceased. The names of two persons as attesting witnesses were subscribed to the will, but the evidence showed that one of the witnesses wrote his own name, and also that of the other witness, at her request. She was temporarily unable to write herself on account of a felon on her right hand.

Coffin, S.—The question as to whether the alleged will was sufficiently executed according to the requirements of our statutes on the subject, inasmuch as the names of both witnesses were written solely by one of them, is alone presented for adjudication. In this respect it will be seen that while the statute requires that the will shall be "subscribed" by the testator at the end of the will, it also provides that "there shall be at least two attesting witnesses, *each* of whom shall *sign his name* as a witness at the end of the will at the request of the testator."

Thus there is a change from the word "subscribed," as applied to the act of the testator, to the words "sign his name," as applied to the act required of the witnesses. Whether it was intended by the legislature to treat the words "subscribe" and "sign" as synonymous is fairly open to question. If it did not so intend, why did it not use the same word in each instance? The word "subscribe," according to the best lexicographers, is to write underneath, while "sign" is defined to affix a signature to. And it was held in the English courts that the word *sign*, as used in the statute of frauds, was sufficiently complied with if the party wrote his name on the paper in any place, so that even if he commenced by writing, "I, John Jones," and wrote his name in no other place, it was held a sufficient signing within the statute; but the word subscribe clearly means a writing at the end or foot. And, while they have given a very liberal, if not loose, construction of the word "sign," in so far as the statute of frauds affecting contracts was concerned, yet in the case of wills, where the witnesses are required to subscribe as such, they exact some physical act to be done by the witnesses, either by writing their own names or making

their marks. Moore v. King, 3 Curteis 243; 1 Jarm. on Wills, Randolph & Talcott's ed. 215. But that statute expressly permitted the signature of the testator to a will to be made by some other person in his presence and by his direction. The 1 R. L. 364, allowed the same thing. Under these statutes it was held that the signature of the testator or of the witnesses by making a mark was sufficient. Baker v. Dening, 8 A. & E. 94; Jackson v. Van Dusen, 5 Johns. 144. Many other and more recent cases establish the same principle. But the question still remains, is the name of one or each of the witnesses, written by another, a sufficient compliance with the requirement of the statute? In the Goods of John White, 2 Notes of Cases 461, it appeared that a husband, a witness, signed not only his own name, but also that of his wife, the other witness. There was no evidence that the wife had, in fact, become a party to the subscription, and the execution was held to be insufficient. Here, however, the wife was present as a witness, and because of her temporary disability to write her name, requested her husband to write it for her, which he did. All this occurred at the time of the execution of the will by the testatrix and in her presence, and although the latter did not also request the husband to write the wife's name, yet by her silence she sanctioned the act.

Surrogate Bradford, eminent for learning and industry, seems to have inclined to the opinion that an attesting witness must take some physical part in the act of *signing*, in order to a compliance with the statutory requirement of signing his name. Campbell v. Logan, 2 Bradf. 90–97; Meehan v. Rourke, Id. 385–392. This is probably in accord with the tenor of English decisions on the subject, with some few exceptions; but while the precise question has not, so far as known, been determined by the courts of this State, yet in some of our sister States a subscription by a witness in the manner it was done in this instance has been held sufficient. In Massachusetts, in the case of Chase v. Kittredge, 1 Allen 49–59, Gray, J., says: "A subscription of the name or mark of a witness by another person in the presence of himself and the testator might possibly be a literal compliance with the statute; but not being in the handwriting of the witness, would create no presumption of a lawful execution and attestation without affirmative evidence that it was so made."

Here we have such affirmative evidence. See, also, Horton v. Johnson, 18 Ga. 396. In Upchurch v. Upchurch, 16 B. Mon. 102 (Ky.), and in Jesse v. Parker, 6 Gratt. 57 (Va.), it was expressly held that such a signature of the witness' name as occurred in this instance was a sufficient execution under a similar statute. In the latter case, we have represented the singular fact of a will being sustained where the body of the will, the name of the testator, of the three witnesses required in that State, were all in the handwriting of one person. As was well said in that case: "Where the attestation is by mark, the validity of such an attestation does not depend upon the fact of the witness making his mark, or doing some manual act in connection with the signature, but upon the signing of the name of the witness by his authority."

The maxim, *qui facit per alium facit per se*, has, doubtless, its limitations; but it is difficult to discover why it is not applicable here. The frauds in the execution of wills which the statute was designed to guard against will in no way be facilitated by the sanctioning of this mode of execution. Still, where we consider that the art of writing is so common that there can be little trouble in finding witnesses who can write their names, it is desirable that wills should be witnessed by such persons, especially in view of the fact that should they make their mark, or sign by the hand of another, and they should predecease the testator, there would be no possibility of proving their handwriting, and then the will could not be admitted to probate, unless other persons should chance to be present who could testify to the facts. For the statute provides that in case the witnesses be dead, the will may be established by proof of the *handwriting* of the testator and of the subscribing witnesses. (Code, sec. 2620.)

At first my impression was that the execution of this will was insufficient; but a further examination of authorities and subsequent reflection have led to a different conclusion. It is, therefore, held to be a valid will, in so far as its execution is concerned.

(2). POSITION OF THE SIGNATURES.

Some statutes require the witness to "sign," some to sign at the "foot," or "end," some to "subscribe." Accordingly, the decisions on what shall constitute a valid signature, as concerns its position on the instrument, vary.

(*a*). *Where the position is not specified by statute.*

In the Goods of Braddock.

HIGH COURT OF JUSTICE, PROBATE DIVISION, 1876.

(1 P. D. 433.)

Mary Ann Braddock, late of Liverpool, in the county of Lancaster, widow, died on the 9th of February, 1876. Her will had been executed in 1864, and was on one side of one sheet of paper. On January 25th, 1876, she made an erasure and interlineation in the will, and also wrote a codicil on a separate and smaller piece of paper. This was attached to the will with a pin. She duly executed this codicil in the presence of the witnesses, and at her request one of them wrote *on the back of the original will*, the words: "Also signed this day in the presence of each other, January 25th, 1876," below which the witnesses then signed their names in her presence.

(June 27.) SIR *J. Hannen* (President).—In this case the witnesses, instead of attesting the signature of the testatrix on the paper itself, attested on the back of the original will, to which that paper was attached by a pin. The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the court that the witnesses in signing their names had the intention of attesting. But the attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet. No particular mode of affixing one piece of paper to another is prescribed by law, and I cannot say that the fastening of two sheets of paper together by a pin is an insufficient mode of connection, or that it is less effectual than the lawyer's mode of fastening by tape. Here I am satisfied by the evidence that the papers were connected together, and that in writing their names on the back of the original will, the witnesses intended to attest the signature of the testatrix at the foot of the codicil. That codicil, being duly executed, confirms the will in its altered state, and probate will go accordingly.

In the Goods of Wilson.

ENGLISH COURT OF PROBATE, 1866.

(L. R. 1 P. & D. 269.)

The will of John Wilson, of Sheffield, ended at the bottom of the first page thus:

"John Wilson.

Witness, William Hatton."

At the top of the next page were these words:

"Leasehold property.

A cottage situate in George-street, in the parish of E——, in the county of York;" and beneath were three signatures:

"Wm. Parker,
Benjamin F. Littlewood,
William Darley."

Only one witness, Littlewood, testified at the hearing, the others having died. His memory of the circumstances attending execution was very indistinct.

SIR *J. P. Wilde.*— . . . It is said that the position of the names of the witnesses is immaterial, provided they are in such a position as to show that they were placed there for the purpose of attesting the will. In considering whether persons have subscribed a will as attesting witnesses the position of the signatures may be most material.[1] If they are written under an attestation clause no difficulty arises, but if they are placed elsewhere their position may be important, because if they are placed under a particular clause or statement the inference is that *primâ facie* they were put there to give effect or to testify to the words of the clause or statement. . . . If these names appeared at the top of the page it might have been supposed that they were put there for the purpose of attesting the will. But we find this memorandum and these names written under it, very probably because they are to become trustees of the property to which the memorandum relates. They probably signed for the purpose of giving their assent to the acceptance of the trust; but whatever may have been their motive for attesting the memorandum, it does not ap-

[1] Dodworth v. Crow, 1 Dem. 256.

pear that they were placed there in order to attest the deceased's signature to the will. . . . In reality this witness adds little light to the transaction, and does not contradict the obvious circumstances as they appear on the face of the paper. I must refuse probate of the paper.

Probate refused.

(*b*). *Where the position is specified by statute.*

1. In Kentucky, for instance, the witnesses must "subscribe."[1]

2. In New York, for another instance, the witnesses must sign their names "at the end of the will."[2]

3. Below testator's signature was a written assent to the provisions of the will, signed by testator's wife. By mistake one of the witnesses, intending to witness merely the execution of the will, signed his name below this assent instead of above it. It was held a good "subscription."[3]

4. Even where the place of signing is designated, as well as in cases where mere "signing" is required, the exact position of the signatures in a given case may of course be evidence on the question whether they were in fact intended as an attestation.[4]

(3). IN THE PRESENCE OF THE TESTATOR.

Nearly all the statutes of wills require the witnesses to sign in the "presence" of the testator.[5] The determination of just what this word "presence" means has in many reported cases proved very perplexing. We will first give a number of illustrations drawn from actual cases, and then state what appears to be the correct rule.

Illustrations.

(*a*). Wyatt Cater, the testator, was, at the time of the subscription by the witness, in a state of insensibility. Lord Mansfield: "All the witnesses knew, at the time of the attestation, that the

[1] Soward v. Soward, 1 Duv. 126.

[2] 2 N. Y. R. S. 63, sec. 40, subd. 4, Birdseye's Ed. p. 8343, sec. 8, subd. 4.

[3] Potts v. Felton, 70 Ind. 166.

[4] Dodworth v. Crow, 1 Dem. (N. Y.) 256. In Goods of Wilson, given *ante*.

[5] In New York the witnesses are not required by the statute to sign in testator's presence. Rudden v. McDonald, 1 Bradf. 352; Vernam v. Spencer, 8 Bradf. 16.

testator was insensible. He was a log, and totally absent to all mental purposes." Buller, J.: "The attestation in the testator's presence is as essential as his signature, and all must be done while he is in a capacity to dispose of his property. . . . . Here the trunk remained but the man was gone." [1]

(*b*). Will of Alanson Allen. Cornell, J.: "Neither is it important to determine whether the testator actually saw the subscribing witnesses subscribe their names as such, as it is quite clear, both from the evidence and the findings, that it was done in his immediate and conscious presence, and that he could have seen it, if he had felt so disposed." [2]

(*c*). W. W. Walker, the testator, was lying in bed, when the witnesses signed, and was "facing west." The witnesses signed on a table "east and back of testator." He had the physical ability to turn his head and see them sign had he chosen to do so. The signature was held to have been in his presence.[3]

(*d*). Testator lay in bed, with his back to the witnesses, unable to see them sign or to turn himself over. Their signing was held not to have been in his presence.[4]

(*e*). Patrick Persse, the testator, executed his will while sick in bed in a small room. The curtains were drawn away at the sides of the bed, but at the foot they shut off the view of the fire. One of the witnesses signed at a small table at the foot of the bed and cut off from testator's view by the curtain. It was held that the requirement that the signing must be in the line of vision applies where the witnesses are in another apartment, but not necessarily when they are in the same room.[5] The decision in this case apparently rests on the presumption hereafter to be referred to

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[1] 1 Doug. 241; also Orndorff v. Hummer, 12 B. Mon. (Ky.) 619.

[2] Allen's Will, 25 Minn. 39; also to the same point, Tod v. Winchelsea, 2 Carr. & P. 488.

[3] Walker v. Walker, 67 Miss. 529. And so, also, if he could have seen, if he chose, by merely changing his *posture*, and was able to do so himself. Aikin v. Weckerly, 19 Mich. 482.

[4] Neil v. Neil, 1 Leigh (Va.) 6; it would not suffice that he might have been moved by others, had he desired it, Id.; *contra* as to this last point, see Orndorff v. Hummer, 12 B. Mon. (Ky.) 619.

[5] Newton v. Clarke, 2 Curt. 320.

that *primâ facie* a signing in the same room is in testator's presence, and on the fact that for all that appeared he might have pushed aside the curtain had he chosen to do so. The witnesses, when signing, were within the line of his vision, save only for the curtain close to him.

(*f*). When the witnesses signed, the bed curtains were drawn close all around the bed where testatrix lay dying. She lay on one side with her face away from the witnesses, and could not have turned over, or seen them, even if the curtains had been open. The signing by witnesses was held not to have been in the presence of the testatrix.[1]

(*g*). Even though in the same room, if the signing were shown to have been done in a corner in a secret and clandestine manner, it would not be "in the presence" of the testator.[2]

(*h*). The witnesses to the will of Barbara Ambre signed in an adjoining room. The door was open, and from where she lay propped up in bed she could have seen them sign if she chose. This was sufficient.[3]

(*i*). Testator was lying sick in bed in one room. One witness signed in the next room. The door was open between, and if testator had sat up in bed, as he was able to do, he could have seen the will signed. "The test in this case is, whether the testator might have seen, not whether he did see, the witnesses sign their names."[4]

(*j*). The testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that and the door of the room where the testator lay were open so that he might have seen them subscribe their names if he would; and though there was no positive proof that he did see them subscribe, yet that was a sufficient subscribing within the meaning of the statute.[5]

(*k*). Honora Jenkins executed her will while sitting in her car-

[1] Tribe v. Tribe, 1 Roberts. 775. [2] See Longford v. Eyre, 1 P. Wms. 740.
[3] Ambre v. Weishaar, 74 Ill. 109. .
[4] In Goods of Trimnell, 11 Jur. (N. S.) 248.
[5] Davy v. Smith, 3 Salk. 395.

riage outside her attorney's office. The witnesses then took the will into the office and signed it there. Through the office window testatrix might, had she wished, have seen them sign. In the opinion of Lord Chancellor Thurlow, the will was well executed.[1]

(*l*). The testator requested the witnesses to go into another room seven yards distant, to attest the will. In that room there was a window broken through which testator might see them. *Per Cur.:* "The statute required attesting in his presence, to prevent obtruding another will in place of the true one. It is enough if the testator might see, it is not necessary that he should actually see them signing, for at that rate if a man should but turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he might have seen it, and that is enough."[2]

(*m*). Charlotte Piercy, the testatrix, at the time of the execution of her will, was very sick, and totally blind. After she had signed in the presence of the witnesses, they signed in an adjoining room across a passage. The doors were both open, and from where she lay she could have seen them sign if she had not been blind. Sir Herbert Jenner Fust: "When this case was moved on a former occasion, there was no evidence to show that the testatrix could have seen the witnesses sign, had she had her eyesight, and I felt I could not place her in a better position than one who could see. It does not appear whether there were curtains to the bed; still, as it is positively sworn by two witnesses that she could, had she had her sight, have seen from her bed the witnesses subscribe, I cannot refuse this application."[3]

(*n*). Jackson Riggs, the testator, was, when he executed his will and codicil, obliged, as a result of an accident, to lie on his back and was unable to turn his head or look sideways. The codicil was signed by the witnesses at a table within four feet of him, and he could have seen them sign if he had been able to move his

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[1] Casson v. Dade, 1 Bro. Ch. 99. [2] Shires v. Glascock, 2 Salk. 688.

[3] In Goods of Piercy, 1 Roberts. 278. In proving a blind man's will it must be shown that he knew in some way the contents of the will he executed. It is not strictly necessary, however, that the identical will be read over to him. Fincham v. Edwards, 3 Curt. 63.

head. His case was held to be the same in principle as that of a blind man. Practically, he was deprived of the use of his eyes. The signing was held to have been done in his "presence." [1]

(*o*). The witnesses to the will of Alexander Ellis took the instrument into another room to sign their names to it. The doors were open, and they were so near him that they could hear him breathe. But they could not see him nor be seen by him. The signing was held not to have been in his presence.[2]

(*p*). William Norton, the testator, signed his will in one office. The witnesses then signed it in an adjoining office. The door between the rooms was wide open. A line passing from the desk where testator sat, to that where the witnesses signed, would necessarily curve in order to pass through the open doorway. It was held that as they were out of testator's range of vision where he sat, the will was not signed in his presence.[3]

(*q*). Mary Ann Killick, the testatrix, lay sick in bed in one room. The witnesses signed in the next room. The door was open between. By raising herself in bed, and inclining her head, she could have seen them sign, but not otherwise. She had not seen and did not see the witnesses at all, or know they were signing, or even know they were there. Sir J. P. Wilde: . . . . "I think such an act as this cannot be said to be done by one person in the presence of another, unless at the time each is aware of the other's presence." On this (and another) ground he pronounced against the codicil in question.[4]

(*r*). The attesting witnesses of the will of Emma Loring were present at its execution, but did not themselves subscribe it for about half an hour, and then did so in an adjoining room. The door was open between the two rooms, but the testatrix was sick,

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[1] Riggs v. Riggs, 135 Mass. 238. For a somewhat similar case, where, however, the place of signing was not even within testator's "range of vision," and yet the will was upheld, in admitted violation of the rule generally established, see Cook v. Winchester (Mich.), 46 N. W. 106.

[2] In Goods of Ellis, 2 Curt. 895.

[3] Norton v. Bazett, Deane & Sw. 259, giving a diagram showing the position of the desks, the doorway, etc. This was reconciled with Newton v. Clarke, *supra*, by the fact that here the witnesses were in another room.

[4] In Goods of Killick, 3 Sw. & Tr. 578.

and could not from where she lay have seen them sign, and did not even know, at the time, that they were doing so. Sir James Hannen: "In no sense can it be said that the witnesses signed in the presence of the testatrix, and this document is therefore inoperative as a testamentary instrument." [1]

The principles to be deduced from the authorities illustrated by the foregoing instances, may now be stated as follows:

In States where the statutes require the witnesses to sign in "the presence" of the testator, it is not essential that they should sign in the same room with him. The cases thus fall naturally into two classes, those where the witnesses do, and those where they do not, sign in the room with testator. These classes should be considered first together and then separately.

First, then, as the general purpose of the statute is to insure a reasonable opportunity for testator to oversee the acts of the witnesses, be sure that they sign the paper as he turns it over to them, and generally be in a position to satisfy himself of their faithfulness and accuracy, the best practical meaning to be attributed to the word "presence" is that it requires the witnesses to sign where testator *can see them* if he wishes to, and it is not required that he must in fact actually see them. Such being the purpose of the statute, let us now consider the two classes of cases.

(*a*). *Signing in the same room.*—Here the natural and logical *primâ facie* presumption is, that the position of the witnesses satisfies the statute, though this presumption may be overthrown by proof. But the actual facts shown must be weighed in the light of the purpose of the statute, and if it be shown that they signed where the given testator *could not* have seen them if he had tried, then the signing was not in his presence.

(*b*). *Signing not in the same room.*—Here the reasonable *primâ facie* presumption is that the signing was not in testator's presence. But if the actual facts show that the spirit and purpose of the statute were fully satisfied, that is, if the signing was in the line of testator's vision where he was, so that he could have seen without changing his *location*, or doing more than shifting his *position*, as by turning his head, or rolling over on his side, then

[1] Jenner v. Ffinch, 5 P. D. 106.

it was in his *constructive* "presence" in the sense intended by the statute, although not in his *actual* presence.[1] In this case it does not suffice that testator might, by rising and walking a few steps, have brought the witnesses within his range of vision.

THE ATTESTATION CLAUSE.

It is the usual practice to place at the end of the will, after the signature of the testator, a formal statement enumerating the several statutory requisites of due execution, and alleging that they have been duly complied with. The common form is substantially as follows:

(Signature of testator.) (Seal.)[2]

Signed, sealed, published and declared by the above-named testator, as his last will and testament, in the presence of us who, at his request, and in his presence, and in the presence of each other, have hereunto set our names as witnesses, this day of , 18 .

(Signatures of witnesses.)

This form in any given case may be shortened by omitting reference to any acts not called for by the controlling statute, or changed to adapt it to the actual facts. Thus, a testator may have signed his name beforehand, and acknowledged his signature (where that is required) in the presence of the witnesses, in which case the statement in the attestation clause should correspond to these facts. It is not necessary to have any attestation clause at all,[3] and if one is added, it is sometimes very brief, as, for instance, the mere phrase "Witnessed by," or "Witness our hands," etc. When it states the details of the execution, it furnishes a convenient memorandum of what actually took place, and its value as evidence is set forth in the following cases.

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[1] Mandeville v. Parker, 31 N. J. Eq. 242; Neil v. Neil, 1 Leigh (Va.) 6; Orndorff v. Hummer, 12 B. Mon. (Ky.) 619.

[2] Apart from the possible bearing of any local statute in force at the time in question, a seal is not now necessary in England or in any State of the Union. For a New York illustration, Matter of Diez, 50 N. Y. 88.

[3] *In re* Look's Will, 5 N. Y. Supp. 50; Jackson v. Jackson, 39 N. Y. 153 (159), and cases cited; Robinson v. Brewster, 30 N. E. Rep. (Ill.) 688.

(1). *Where the witnesses forget the facts.*

In the Will of James Morrison.

SURROGATE'S COURT, NEW YORK COUNTY, NEW YORK, 1892.

(N. Y. State Rep.)

Ransom, S.—The paper was executed in 1861. The two subscribing witnesses—intelligent men—have no recollection of the facts attending the execution of the paper. They knew the decedent well, recognized his signature and testified that they were confident, having signed the attestation clause, the recitals therein must be true. The clause comes in aid of probate when by the lapse of time the memories of witnesses fail to recall the facts. (Matter of Pepoon, 91 N. Y. 255.) The will may be admitted to probate.

[Also Matter of Holgate, 1 Sw. & Tr. 261; Matter of Kellum, 52 N. Y. 517; Rugg v. Rugg, 83 N. Y. 592; Gove v. Gawen, 3 Curt. 151; Brown v. Clark, 77 N. Y. 369 (372); Stoutenburgh v. Hopkins, 43 N. J. Eq. 577. Where the witnesses disagree, the rule is that affirmative evidence of what did take place is intrinsically of more weight than negative testimony that certain acts were not performed. Chambers v. Queen's Proctor, 2 Curt. 415.]

In the Goods of John Holgate (deceased), on Motion.

ENGLISH COURT OF PROBATE, 1859.

(1 Sw. & Tr. 261.)

The deceased, John Holgate, died on the 13th September, 1858, leaving a will in his own handwriting, which terminated thus:

"This 15th day of August, 1851.

"Signed by me, John Holgate, the testator, as and for his last will and testament. In the joint presence of us present at the same time, who in his presance, at his r quest, and in the pres nce of each othior, have her unto subscribed our names as witnesses.

"John Holgate.

"John Hodgson. Henry Guy."

The attesting witnesses in their affidavits stated "that they signed the paper at the request of the testator, who said

when he brought it to them, 'I want you to sign this,' or 'Put your name to this,' or in words to that effect, but they could not recollect the exact words; that they were both present at the time, and subscribed the will in the testator's presence; that they could not say positively, whether the said will was signed when he, the testator, brought it to them or not, but to the best of their recollection and belief it was, though they could not recollect whether he signed it in their presence or not, their impression being that he did not, but that it was signed when he first brought it to them; that the signature was in the handwriting of the deceased; that, to the best of their recollection, the testator did not mention that the said paper he so requested them to sign was his will, but that they could not be sure that he did not, but they then thought and considered it was his will." The will was executed at the house of the witness John Hodgson, and shortly afterwards was handed by the testator to his daughter, in whose custody, or in that of her husband, it remained until after the death of the testator.

Dr. Middleton cited Faulds v. Jackson (6 N. C. App. 1), and submitted that the evidence of the witnesses, and the position of their signatures, established that if the testator did not sign his name in their presence, his signature must have been seen by them when they subscribed their names.

Sir *C. Cresswell.*—The witnesses cannot recollect whether the testator brought it signed, or signed it in their presence. In either case it is entitled to probate. Probate granted.

In the Will of Stephen Harkins.

Surrogate's Court, New York County, New York, 1892.

(New York Law Journal, May 20, 1892, p. 478.)

Ransom, S.—The paper offered for probate was written on a printed blank form for a will and was executed November 30th, 1891. Upon its face it appears to have been properly executed, and it has a full attestation clause. None but the members of the family, all interested in the will, and the party named as executor, were present at the execution. When the proponent appeared to prove the will, less than four months after its execution, Miss Sheridan, one of the subscribing witnesses, in stating the

order of events, mentioned as the first act the signing by the witnesses. On further examination she was undecided as to whether they or the decedent signed first, and the reading of the attestation clause to her did not aid her memory. Nor did she remember seeing decedent's signature when she signed. An adjournment was granted to enable her to further reflect on the matter, and on being recalled she stated, in answer to the question whether the signatures of the witnesses preceded the signing by the decedent, "I think that we signed first," and she further stated that such was her present conviction. The other witness, Mrs. Vorbach, could not be produced on account of illness and an adjournment was granted in the hope to procure her testimony. When it appeared to my satisfaction that she could not be produced, an order was entered dispensing with her testimony and her son proved her signature and testified that his mother was in her last illness, and that the disease from which she has suffered has affected her mind. It is the law that, when from the lapse of time, the memory of a witness cannot recall the events that took place on the execution of a will, the existence of an attestation clause correctly reciting the various acts as they should have been done, will be accepted as evidence of a valid execution. A period of less than four months after the execution of this will hardly falls within the range of the decisions. But as there is no question of the existence of a testamentary purpose or the good faith of all the parties interested in the proceeding, and no injustice will be done thereby, I will admit the will on the recitals in the attestation clause.

In the Matter of the Probate of the last Will of William G. Alpaugh, deceased.

NEW JERSEY PREROGATIVE COURT, 1872.

(28 N. J. Eq. 507.)

An appeal from decree of the Orphans' Court of Hunterdon County.

THE ORDINARY.—The objection to the will in this case being admitted to probate is, that it does not appear by proof that the testator signed it in the presence of the witnesses, or that he acknowledged the signature to be his in their presence. This is

required by the statute, *Nix. Dig.* 1032, sec. 24, and no other evidence can be allowed to supply the defect. If twenty witnesses saw him sign or heard him acknowledge the signature, it will not supply the requirement of signing or acknowledgment, in the presence of the persons whom he selected as the legal witnesses of this solemn act. In this case the testator drew the whole will, including the attestation clause, which declares that it was signed in the presence of the witnesses. The witnesses testify that after Mr. Alpaugh's name was signed to the will he took it in his hand, declared it to be his last will, and asked them to sign it as witnesses.[1] Neither of them testifies that he saw Alpaugh sign it, or that he acknowledged the signature to be his. Neither of them says that Alpaugh did not sign it in their presence. They were not asked directly whether they saw him sign. Each states such facts as he remembers, and says further that he does not recollect all that was done or said.

In such case, as in the case of the death of the witnesses, the attestation clause must be taken as true, and as proof of signature in their presence. Most especially in this case, where the attestation clause is in the handwriting of the testator, and shows that he knew the requirements of the law, the presumption will be that he saw to it that they were complied with. If the attesting witnesses had testified that they did not recollect whether the will was signed in their presence, the effect would be the same. If they had testified positively that the will was not signed in their presence, but was signed before they came, their evidence would not be overcome by the certificate in the attestation clause, but might be by convincing proof that it was actually signed in their presence.

In this case the want of recollection, or the want of proof, is remedied by the presumption arising from the attestation clause, and is sufficient to warrant the determination of the Orphans' Court in admitting the will to probate, as signed by the testator in the presence of the attesting witnesses.

The decree must be affirmed.

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[1] In New York and some other jurisdictions this would constitute an acknowledgment of a signature then already on the will and visible. Baskin v. Baskin, 36 N. Y. 416, given *ante*.

(2). *Where the witnesses fraudulently deny the facts.*

The three subscribing witnesses to the will of Mr. Jolliffe, and the two surviving witnesses to a codicil, all testified against the due execution of the instruments (on the ground of mental incapacity). Many others, not attesting witnesses, testified to the contrary, among them Mr. Rupert Dovey, the attorney who drew the will. The reporter (Sir Wm. Blackstone) says: "Upon the whole it appeared to be a very black conspiracy to set aside this gentleman's will, without any foundation whatsoever." After a trial of fifteen hours the jury were out only five minutes, and brought in a verdict establishing the will.[1] Subsequently the three subscribing witnesses to the will were convicted of perjury, and were sentenced each of them to be imprisoned six months, to stand twice in the pillory, with a paper on their heads denoting their crime, once at Westminster Hall Gate, and once at Charing Cross; and to be transported to America (3 Geo. III.) for seven years. They afterwards obtained a pardon in respect to their transportation.[2]

(3). *Probate refused in spite of attestation clause.*

At the end of the will of Thomas Lewis was an attestation clause, signed by two witnesses, stating that "the above written instrument was subscribed by the said Thomas Lewis in our presence, and acknowledged by him to each of us, and he at the same time declared the above instrument so subscribed to be his last will and testament, and we at his request have signed our names as witnesses hereto." The testimony of the two witnesses showed, however, that in fact the signature of testator was neither made nor acknowledged in their presence, and that testator did not declare the instrument to be his will. W. F. Allen, J.: [The formal execution and publication] "cannot, however, be presumed in opposition to positive testimony, merely upon the ground that the attestation clause is in due form and states that all things were done which are required to be done to make the instrument valid as a will."[3]

[1] Lowe v. Jolliffe, 1 W. Bl. 365. [2] The King v. Nueys, 1 W. Bl. 416.
[3] Lewis v. Lewis, 11 N. Y. 220; also Orser v. Orser, 24 N. Y. 51; Tarrant

(4). *Probate granted in spite of testimony.*

In the Matter of Samuel Cottrell, deceased.

NEW YORK COURT OF APPEALS, 1884.

(95 N. Y. 329.)

Appeal from judgment of the General Term of the Supreme Court, third department, entered upon an order affirming decree of the surrogate of Rensselaer County, admitting to probate the will of Samuel Cottrell, deceased.

There was a full attestation clause, but the two witnesses both denied all its allegations and also denied that they had in fact signed it.

Ruger, Ch. J. (After considering the power of the Court of Appeals to re-examine conclusions of fact reached by the court below.) The Code of Civil Procedure has also put, in the form of a statutory enactment, a rule in relation to the proof necessary to show the valid execution of a will which had indeed before then been well settled, but had previously existed by force of adjudication alone, viz.: That the due execution of a will might be established by competent evidence, even against the positive testimony of the subscribing witnesses thereto.

So much of Section 2620 as is material to the point under discussion reads as follows: "If such a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, the will may, nevertheless, be established upon proof of the handwriting of the testator and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action." (The court here discuss numerous authorities, and consider and weigh the testimony of the witnesses and the circumstances connected with the execution.)

The surrogate has found as a fact upon conflicting yet competent evidence, that the subscribing witnesses to the will in question in fact signed the attestation clause.

We thus have an holographic will, not only properly signed and

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v. Ware, reported in note, 25 N. Y. at 425, and cases cited; Will of Meurer, 44 Wis. 392, and cases cited; Glover v. Smith, 57 L. T. 60; Keithley v. Stafford (Ill.), 18 N. E. Rep. 740.

executed by the testator, but also signed by the witnesses, and appearing upon its face to be entirely regular, and purporting to have been executed with all the formalities and in the manner required by the law to make a good and valid will.

The witnesses to the will have, by signing the attestation clause, certified to facts taking place upon its execution, directly conflicting with the evidence given by them upon the trial. To believe this evidence requires us to suppose that the testator deliberately forged the names of witnesses to his will at a time and under circumstances when it was just as convenient for him to have obtained their genuine signatures thereto. Upon the evidence the surrogate has refused to give credit to their testimony, and must, we think, necessarily have found, for reasons appearing sufficient to him, that none of the evidence given by them was entitled to belief. (The court here consider the intrinsic improbability of these witnesses' testimony, and call attention to the general presumption of due execution arising from the supervision of experienced persons familiar with the statutory requisites and with the importance of compliance with them, citing Chambers v. Queen's Proctor, 2 Curteis 415; *In re* Kellum, 52 N. Y. 519; Gove v. Gawen, 3 Curteis 151; Peck v. Cary, 27 N. Y. 9.) [Matter of Smith, 39 N. Y. State Rep. 698; Matter of Nelson, 43 N. Y. State Rep. 30.]

We think that that presumption also arises in this case. The testator had not only once correctly gone through the ceremony of executing a will, but by drawing the attestation clause in question he had at the time necessarily brought before his mind each one of the conditions imposed by the statute as necessary to its valid execution. It is quite unreasonable to suppose that such a person having drawn and signed a will, and having added thereto a proper attestation clause, should have provided witnesses therefor, and required them to sign a certificate to the effect that each of the required formalities had then been observed, without also providing for their actual performance. He had knowledge of the necessity of the act required, to the validity of the business he was then transacting, and to hold that he omitted it would oblige us to ascribe to him the intention of performing a vain and useless ceremony at the expense of time and labor to himself and the commission of a motiveless crime. The presumptions arising

from the certificate of the subscribing witnesses, and the supervision of an experienced person that the requisite formalities were complied with, are fortified by the acts and conduct of the testator. Nearly three years elapsed between the date of the will and the death of the testator, and he had, therefore, ample time and opportunity to supply any defects in its execution, if any existed, but at the last moment, when the subject of a will was brought to his attention, he evidently supposed that he had made a valid testamentary disposition of his property.

It also appears that it was executed while the testator was living in the family of the alleged witnesses; that one of them had formerly acted in a similar capacity for him, and that they were both persons who for convenience, as well as from their relations to the testator, would naturally have been selected as witnesses to a will drawn by himself, and whose execution he personally supervised.

We think the various circumstances to which we have referred, in connection with the full and regular attestation clause in the handwriting of the testator, proved to have been signed by the witnesses, were sufficient to authorize the finding by the court below establishing the will.

Of course no controversy can arise in this case over any question as to the real intention of the testator in the disposition made by his will of his property, for not only were his wishes deliberately formed, but they are recorded in his own handwriting, which implies care and deliberation on his part in framing its provisions and directions. It is the duty of the court to carry into effect a testator's intentions when they can be discovered, provided they do not contravene any provision of law.

It follows from these views that the judgment appealed from should be affirmed.

All concur, except *Rapallo*, J., not voting.

Judgment affirmed.

[Also Orser v. Orser, 24 N. Y. 51.]

(5). *No attestation clause.— Witnesses dead.*

In the Goods of Jane Thomas (Widow, deceased), on Motion.

ENGLISH COURT OF PROBATE, 1859.

(1 Sw. & Tr. 255.)

In this case the will of the deceased bore date the 10th of October, 1842. By it Jane Burnet, wife of James Burnet, formerly Jane Bishop, spinster, was appointed executrix. The signature was attested by three witnesses, but there was no attestation clause. The signatures appeared under the word

"Witness,

"Benjamin Franklyn,

"John Skeggs,

"Mary Skeggs."

B. Franklyn, a spirit merchant at Plymouth, deposed on affidavit that he remembered being requested by the testatrix to attest her signature to the will, and that she did sign her name in his presence, and that he thereupon subscribed his name in her presence: "and further, that after the interval of so many years he was unable to recollect exactly all the circumstances attending his so subscribing the said will; but, as well as he remembered, the testatrix and he were the only persons present at such time, and the signatures of John Skeggs and Mary Skeggs, which now appear subscribed to the said will immediately under his signature, were not so subscribed in his presence. He remembered that he made a suggestion to the deceased, at the time he subscribed the will, that another witness ought to be present, but what further passed on the subject he was unable to recollect. That he had no knowledge whatever whether the testatrix afterwards acknowledged the signature of the said will in the presence of the said two witnesses whose names appeared subscribed thereto, or of the circumstances under which such witnesses so subscribed the said will."

John Skeggs and Mary Skeggs were since dead. They were people of some consequence at Devonport. Their handwriting was spoken to by two witnesses.

Dr. *Spinks* moved the court to decree probate of the will to

the executrix therein named. He cited the remarks of Dr. Lushington in Burgoyne v. Showler, 6 Rob. Eccl. Rep. 10: "If a party is put on proof of a will he must examine the attesting witnesses. On the present occasion there are two subscribed witnesses; if these persons were dead, the law would presume the will to be duly executed," etc. He submitted, that though Franklyn's affidavit made his signature unavailing, yet the presumption would now be that the testatrix afterwards duly acknowledged the signature in the presence of Skeggs and his wife, and that they duly subscribed their names.

Sir *C. Cresswell.*—I cannot at present grant this motion. The presumption which would arise on the face of this paper with regard to the three subscribed names, is in part rebutted by the affidavit of Franklyn. Does the rest of the presumption hold good as to the other names? They have not the appearance of being written in the same ink.

Cur. adv. vult.

Sir *C. Cresswell.*—I think I may fairly assume that the will was duly executed. The first subscribed witness who survives states in his affidavit that he explained to the testatrix that two witnesses were required to be present at the execution of a will, and it appears that some time afterwards the testatrix obtained the signatures of two other witnesses. It is a fair presumption, that she acted upon the information given to her, and got these last two witnesses to attend in order that she might acknowledge her signature in their presence.

Probate granted.

COMPETENCY OF WITNESSES.

The Statute of Frauds in its provisions concerning wills, called for *credible* [subscribing] witnesses. It has long been well settled that this word "credible," or "creditable," is to be taken in the sense of "competent," [1] and is intended to require as subscribing witnesses to wills persons not legally disqualified from testifying in courts of justice by reason of mental incapacity, interest, or the commission of crime, or other cause disqualifying

[1] Amory v. Fellowes, 5 Mass. 219; Taylor v. Taylor, 1 Rich. L. (S. C.) 531; *In re* Estate of Noble, 22 Ill. App. 535.

them from testifying generally or rendering them incompetent in respect of the particular subject matter or in the particular suit.[1]

This subject is a branch of the law of evidence rather than of the law of wills. But it may not be out of place here to state the more important principles concerning the competency of subscribing witnesses to wills.

The word "credible" has generally been abandoned, in our statutes, in favor of the word "competent." It is clear, from the test of competency above stated, that it varies with the varying general laws in the field of evidence. At common law, for instance, a wife was not a competent witness to a will under which her husband was a devisee. But wherever the general competency of the wife has been established, as a witness in her husband's favor, it would appear that she should thereby become competent to witness a will favorable to him. And such has been held to be the result.[2]

The requirement of competency refers to the date of execution and not to that of testifying in court.[3] Competency acquired subsequently, and before the proceedings for probate, will not suffice, as, if a child, too young to be a competent witness, should nevertheless subscribe the will and should afterwards, and before probate, become old enough to satisfy the requirement of competency, this would not answer.[4] And so, also, if the witness is competent at the time of execution, subsequent loss of competency, as, for example, by insanity, will not affect the validity of the will.[5]

It may also be added, that an interest as executor, or in other purely fiduciary capacity, will not render a witness incompetent,[6] though it has sometimes been held that the prospect of his commissions would give him such an interest as to disqualify

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[1] Robinson v. Savage (Ill.), 15 N. E. 850; Fuller v. Fuller, 83 Ky. 345; Vrooman v. Powers, 47 Ohio St. 191.

[2] Compare Sullivan v. Sullivan, 106 Mass. 474, with Hawkins v. Hawkins, 54 Ia. 443, both given *post*.

[3] Sears v. Dillingham, 12 Mass. 358; Taylor v. Taylor, 1 Rich. L. (S. C.) 531. On this point there has been a divergence of opinion among the courts.

[4] See Carlton v. Carlton, given *post*, concerning infants as witnesses.

[5] Sears v. Dillingham, 12 Mass. 358 (361).

[6] Richardson v. Richardson, 35 Vt. 238; see Sears v. Dillingham, 12 Mass. 358 (360); Piper v. Moulton, 72 Me. 155.

him;[1] but it is generally held that this fact does not render the executor incompetent.[2]

Under the statutes of our several States, many variations are to be found in this general field. Usually, however, if persons incompetent on account of interest under the will, do nevertheless sign as witnesses, the result is that all provisions for them in the will are annulled, and they are then accepted as satisfactory witnesses. But if any such signers are "supernumeraries,"—that is, if there are enough other witnesses to prove the will without them, then they are not cut off from the testamentary provisions in their favor.[3]

It is sometimes further provided that a witness need not be deprived of such part of the testamentary provision for him as he would have received if there had been no will.[4]

Illustrations of these principles, and a statement of other rules concerning competency, will be found in the following cases.

NOTE.

On Competency of Witnesses, see 1 Jarman on Wills, 70 *et seq.*; and at p. 71 (Randolph & T.'s Am. Ed.), a note classifying the American statutes; 1 Redf. 252 *et seq.*

COMPETENT WITNESS.—INFANCY.—PRESUMPTION.

Carlton v. Carlton.

NEW HAMPSHIRE SUPREME JUDICIAL COURT, 1859.

(40 N. H. 14.)

Doe, J.—The statute of wills requires "three or more credible witnesses," and the well-settled construction of this and other similar statutes is, that the witnesses should be competent, or not disqualified, at the time of the attestation of the will, to be sworn and to testify in a court of justice. The argument that attesting witnesses are regarded in law as persons placed around the testator, to protect him from fraud, and to judge of his capacity, and

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[1] Taylor v. Taylor, 1 Rich. L. (S. C.) 531.

[2] Snyder v. Bull, 17 Penn. St. 54.

[3] For example, California Civil Code, §§ 1282, 1283; Howell's Mich. Ann. St., §§ 5791, 5792.

[4] For example, Kansas Gen. St., 7215, and statutes cited in preceding note.

are permitted to testify as to the opinions they formed of his capacity, and that it is contrary to the policy of the law to allow so important a trust to be exercised by children, tends to show that, on account of their peculiar rights and duties, they should possess some other qualifications than those which entitle persons to be sworn as witnesses in court; and it might lead to the conclusion that they should be experts in questions of insanity—a result that would often prevent the making of wills. Undoubtedly the statute was intended to guard against fraud and to provide means of proving the mental condition of the testator. And one of the objects of requiring the presence of witnesses being to give them an opportunity to ascertain and judge of his capacity, it would seem necessarily to follow that they should be allowed to testify the opinions which they were specially appointed to form. But whatever they are required or authorized to do, they are not required to have any other qualifications than those of ordinary testifying witnesses. There is nothing in the statute to demand or to justify any unusual definition of the term "credible witnesses."

The general rule, in common-law trials, is, that the competency of witnesses is to be decided by the court, and that the examination of a child, to ascertain his competency to be sworn as a witness, is made by the judge at his discretion. And it is urged that the competency of the attesting witness, who was under fourteen years of age at the time of the attestation, cannot be proved by other witnesses, but that the determination of the judge, to admit or not admit him to testify, must depend solely upon his own examination of the child, and that the judge cannot, by such examination alone, at the hearing on the probate of the will, judge of his competency at the time of attestation. If this were so, the death of the witness would have barred the probate of the will, although it might have been legally executed. If the attesting witnesses are competent at the time of probate, they may be sworn. Whether they were competent at the time of the attestation is a question entirely distinct and separate from the question of their competency at the time of probate. There is no more reason to confine the judge of probate to the examination of a witness at the probate, to determine whether such witness were competent at the time of attestation, than to limit the judge to the testi-

mony of one witness upon any other question. Whether, at the probate, an attesting witness is incompetent to be sworn, by reason of deficiency of understanding arising from immaturity of intellect, insanity, or intoxication, is a question to be determined by the judge on proper evidence. More evidence from other witnesses may be required to determine whether such incompetency existed at the attestation, than to determine whether it exists at the probate, because the appearance of the witness whose competency is questioned may furnish little or no evidence of his condition at a former time. But the question of his competency is equally open, in both cases, to be settled by such evidence as can be produced. And when the objection to his competency at the attestation is founded upon alleged defect of understanding, it is equally proper to receive the testimony of other witnesses whether the defect is alleged to have arisen from immaturity, insanity, or intoxication. He is presumed to have been competent, until the contrary appears. Without any evidence concerning him, he is not presumed to have been under the age of fourteen years, or insane, or intoxicated. If he were alive and present at the probate, his appearance might sufficiently indicate that he was then under fourteen years of age, or that he was an idiot, and that, consequently, he could not have been competent at the attestation. But if he were dead, or if he were alive, and could not be produced at the probate, the burden of proving him to have been less than fourteen years old, like the burden of proving him to have been insane or intoxicated, would be upon the party asserting his incompetency. Whether, at the probate, he were dead or alive, proof that at the attestation he was under the age of fourteen would overcome the presumption of competency, and make a *primâ facie* case against the due execution of the will, because children under that age are presumed to be incompetent. But such evidence would only substitute one presumption for another. There is no age within which children are absolutely excluded. The degree of understanding which is the test of competency is not developed in all at the same age, and it would be unreasonable to establish any arbitrary and conclusive standard of years. But it is natural that a presumption should be drawn from age, and it is just that such presumption may be rebutted. Persons over fourteen years of age may be incompetent, from defect of under-

standing, and persons under that age may be competent, and it is as proper that the truth should be shown in the one case as in the other. In proceedings in the probate court, whether the attesting witnesses of a will are then competent to testify, is a preliminary question concerning the admission of evidence, to be determined before they are sworn; but whether they were competent attesting witnesses at the time of attestation is a question concerning the due execution of the will, to be decided after they are sworn. If they are competent to testify at the probate, it would be no more an objection to their being sworn, that they were incompetent at the attestation, than that they had been incompetent at any other time. They may be needed to give testimony other than that usually given by attesting witnesses. In a suit at common law, where a witness is called to prove a past transaction, it is no objection to his being sworn that at the time of the transaction he was incompetent to understand it, on account of blindness, deafness, immaturity, insanity, or intoxication. The question of his ability at the time of the transaction to understand it, is for the jury. So if a will were to be proved before a court and jury, the qualifications, at the time of the trial, of the persons offered to testify, would be passed upon by the court, and the qualifications, at the time of the execution of the will, of the persons who attested and subscribed it in the testator's presence, would be passed upon by the jury. The only difficulty or confusion arises from the fact that both of these classes of persons are called witnesses, both classes may be composed of the same persons, and both are required to possess the same qualifications at different times.

In this case one of the witnesses having been under fourteen years of age, is presumed to have been incompetent, but the executor may have an opportunity to rebut that presumption.

COMPETENT WITNESS.—LEGATEE.—TESTIMONY AGAINST INTEREST.

Smalley v. Smalley.

MAINE SUPREME JUDICIAL COURT, 1880.

(70 Maine 545.)

FACTS AGREED.

Appleton, C. J.—This is an appeal from a decree of the judge of probate disallowing the will of Archelaus Smalley.

Bart K. Smalley, a son of the testator and a legatee under the will to the amount of one dollar, was an attesting witness to the same. It is conceded that had there been no will his interest as heir-at-law would have been greater than that under the provisions of the will.

The will is contested on the ground that he was not a competent witness.

The statute relating to the attestation of wills has undergone various verbal changes in the different revisions of the statutes.

By the statute of 1821, c. 38, sec. 2, a will to be valid must "be attested and subscribed in the presence of the testator by three credible witnesses."

In the revision of 1857, c. 74, sec. 1, a will to be valid must be subscribed "by three disinterested and credible attesting witnesses."

In 1859, by c. 120, section first of c. 74 was amended by striking out the words "disinterested and," and adding thereto "not beneficially interested under the provisions of the will."

In the revision of 1871, c. 74, sec. 1, the words "the provisions of" were stricken out, so that now a will is required to be witnessed "by three credible attesting witnesses not beneficially interested under said will."

By a series of decisions in England and in this country it has been determined that the word "credible" was used as the equivalent of "competent," so that the question in such case is whether the attesting witness was a competent witness. Warren v. Baxter, 48 Maine 193; Hawes v. Humphrey, 9 Pick. 361; Haven v. Howard, 23 Pick. 10; Carlton v. Carlton, 40 N. H. 14.

Now, in this case Bart K. Smalley is not interested to sustain the will, but rather to defeat it. When a witness is produced to

testify against his interest, the rule that interest disqualifies does not apply. 1 Greenl. Ev., sec. 410. A legatee, one of several heirs-at-law of a testator, the validity of whose will is in question, may be called as a witness in support of a will, when his interest is manifestly adverse to that of the party calling him. Clark v. Vorce, 19 Wend. 232. So, in Sparhawk v. Sparhawk, 10 Allen 155, an heir-at-law, who is disinherited by the will, is a competent witness in its support. It is against his interest to support the will, and whether entirely or partially disinherited, the same rule must apply so long as it is his interest to defeat the will.

So if it stand indifferent to the witnesses, whether the will, under which they are legatees, and to which they are witnesses, be valid or not, the witnesses, though legatees, are "credible." 10 Bac. Abr. 525 of Wills D. When an attesting witness would take the same interest under a former will to which he was not a witness, as under a later will, he stands indifferent in point of interest, and is a good witness to prove the latter will. 3 Stark. Ev. 1692.

It is apparent that Bart K. Smalley, before any change of the statute of 1821, was a credible, that is, a competent witness, because his interest would be adverse to the will.

When the word "disinterested" was inserted in the statute, as opposed to interested, the result perhaps might be to exclude an attesting witness whose interest it was to defeat the will.

But whether so or not, when that word was stricken out, and the attesting witness was required to be one not beneficially interested under the will, the obvious intention was to exclude those who were to receive a benefit under the will, not those who were pecuniarily losers by its provisions. "The reason why a legatee is not a witness for a will being because he is presumed to be partial in swearing for his own interest"; that reason ceases to exist when his interest is dissevered by such will. Oxenden v. Penrise, 2 Salk. 691.

One who is neither interested to defeat or sustain the will, may well be deemed disinterested. An heir-at-law, who is disinherited in whole or in part, is not disinterested in the result, for he has an interest to defeat the will. Hence he is not disinterested in the result.

The change of language was to remedy or rather prevent such conclusion. The witness beneficially interested under the will was one gaining by and under its provisions. But an attesting witness who is called to establish a will by which he is divested of his inheritance can hardly be regarded as beneficially interested by it, and so interested to maintain it. One losing an estate by a will under which he is a legatee for a cent or a dollar, cannot in any ordinary use of language be considered as a gainer—or beneficially interested, unless a loss is determined to be a gain. As is well remarked by Bigelow, C. J., in Sparhawk v. Sparhawk, referring to Haven v. Hilliard, 23 Pick. 10, where it was said to be held that a witness might be incompetent when his interest was adverse to the validity of the will: "certainly so far as it seems to support the proposition that an heir-at-law, who is disinherited in part or in whole by will, is incompetent as an attesting witness, the case is contrary to well-established principles, and must be overruled."

Undoubtedly, the object in giving this trivial legacy was to guard against the witness taking a portion of the estate under the provisions of sec. 9, by which a child omitted in the will may have its share of the estate, unless such omission was intentional, or such child had had its due proportion of the estate during the life of the testator.

The decree of the judge of probate is reversed, and a decree is to be entered that the will be affirmed.

Walton, *Barrows*, *Danforth*, *Libbey*, and *Symonds*, JJ., concurred.

[Also Campbell v. Campbell (Ill.), 22 N. E. 620.]

COMPETENT WITNESS.—WIFE OF DEVISEE.

Sullivan v. Sullivan.

MASSACHUSETTS SUPREME JUDICIAL COURT, 1871.

(106 Mass. 475.)

Gray, J.—This is an appeal from a decree of Mr. Justice Wells, by which a decree of the probate court, allowing as the will of Margaret Sullivan an instrument which contained a devise to Thomas Sullivan, and to which his wife was one of the three

attesting witnesses, was reversed; and the only question is, whether upon these facts she was a competent attesting witness to the will.

By the law of this Commonwealth, a will must be attested by three competent witnesses, that is to say, witnesses who at the time of the attestation would be competent by the rules of the common law to testify concerning the subject matter. Hawes v. Humphrey, 9 Pick. 350; Rev. Sts., c. 62, sec. 6, and commissioners' note; Gen. Sts., c. 92, sec. 6; Sparhawk v. Sparhawk, 10 Allen 155, 156. And "all beneficial devises, legacies, and gifts made or given in any will to a subscribing witness thereto, shall be wholly void, unless there are three other competent witnesses to the same." Gen. Sts., c. 92, sec. 10.

It is admitted that a wife cannot be deemed a competent witness to a will containing a valid devise to her husband. But it is contended that, within the reason and effect of the section last quoted, a devise to her husband is a beneficial devise to her, and is therefore void, leaving her a competent attesting witness to the will, and the will itself valid in all other respects. And this position, though doubted by a majority of the Supreme Court of Connecticut in Fortune v. Buck, 23 Conn. 1, is supported by earlier decisions in New York and Maine. Jackson v. Woods, 1 Johns. Cas. 163; Jackson v. Durland, 2 Johns. Cas. 314; Winslow v. Kimball, 25 Maine 493.

But with great respect for the learning and ability of the courts which made those decisions, and after carefully weighing the arguments in support of the construction contended for, we are unanimously of opinion that it is founded rather upon a conjecture of the unexpressed intent of the legislature, or a consideration of what they might wisely have enacted, than upon a sound judicial exposition of the statute by which their intent has been manifested. The only devises which the statute declares to be void are beneficial devises to a subscribing witness. It does not avoid even a devise to a subscribing witness, which gives him no beneficial interest, as, for instance, a devise to an executor, for the exclusive benefit of other persons. Wyman v. Symmes, 10 Allen 153; 1 Jarman on Wills, 65. It does not avoid any devise to and for the benefit of any person other than a subscribing witness, even if a subscribing witness would

incidentally take some benefit from the devise. In order to maintain the position contended for, it would be necessary to declare void, not merely the interest which the wife, who was a subscribing witness, would take, by way of dower or otherwise, in the property devised to her husband, but also the whole devise to and for the benefit of the husband himself, who was not a subscribing witness, and whose estate the statute does not assume to reach.

Our conclusion is fortified by a consideration of the history of the legislation upon this subject in England and in this Commonwealth.

The English statute of frauds required wills devising lands to be attested and subscribed in the presence of the devisor by three or four credible witnesses. St. 29 Car. II., c. 3, sec. 5. And that provision was re-enacted here in the first year of the Province. Prov. St. 4 W. & M. (1692–3), c. 15, sec. 3; 1 Mass. Prov. Laws (State ed.) 46; Anc. Chart. 235.

In Holdfast v. Dowsing, 2 Stra. 1253, where a testator charged all his estate, real and personal, with legacies to one of the subscribing witnesses and to his wife, and with an annuity to the wife, the Court of King's Bench held that the statute of frauds certainly meant that the "credible witnesses" should not be such as claimed a benefit by the will; and that, even if the tender to the husband, at the trial, of the amount of the two legacies, would remove the objection on that ground (which the court thought it would not), yet the charge upon the real estate of the annuity to the wife made the husband an incompetent witness. Although the doctrine as to the legacies has been since controverted in England upon the ground that the competency of the witnesses was to be determined at the time of the proof, and not at that of the execution of the will, the incompetency of either husband or wife to be a witness to a devise to the other, which the witness could not release, has never been doubted. Windham v. Chetwynd, 1 Burr. 414, 424; s. c. 1 W. Bl. 95, 100; Bul. N. P. 265. The case of Holdfast v. Dowsing was taken by writ of error to the exchequer chamber, and after argument and before judgment there was compromised by the parties; and gave occasion to the St. of 25 Geo. II., c. 6; 1 W. Bl. 8; 1 Ves. Sen. 503; 2 Bl. Com. 377. The reason of this, as stated by Sir William Blackstone in

his Commentaries, was, that the determination in the King's Bench "alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended upon devises by will"; because it "would not allow any legatee, nor by consequence a creditor, where the legacies were charged on the real estate, to be a competent witness to the devise."

The St. of 25 Geo. II., c. 6, accordingly provided, in sec. 3, that to the execution of wills already made any attesting witness to whom any legacy was given, whether charged upon lands or not, might be admitted as a witness, upon payment, release, or tender of his legacy; and, by secs. 1, 2, that in future wills any attesting witness "to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate" (except charges on lands for payment of debts) "shall be thereby given or made," should be admitted as a witness to the will, within the intent of the statute of frauds, and "such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerned such person attesting the execution of such will, or any person claiming under him, be utterly null and void"; and that charges of debts upon lands should not make any creditor an incompetent witness. All these provisions were re-enacted in our St. of 1783, c. 24, secs. 11–13; and the provision of St. 25 Geo. II., c. 6, sec. 3, and St. 1783, c. 24, sec. 13, for removing the interest of a witness by payment, release, or tender, was omitted in the revision of our statutes in 1836. But neither the St. of 25 Geo. II., nor the St. of 1783, contained any provision as to devises to the wife or husband of an attesting witness, notwithstanding the general attention which had been called to the subject by the case of Holdfast v. Dowsing.

In 1822, a case was brought before the Court of King's Bench, in which a testator devised, upon the determination of an estate for life, an estate in fee to the wife of one of the attesting witnesses, and the wife died before the determination of the life estate. It was argued, that, if before the St. of Geo. II. the husband would have been an incompetent witness, the clear intent of that statute was to restore the competency of the attesting witness in all cases of benefit arising to him under the will, and to avoid the will "so far only" as concerned the person attesting the execution, or any person claiming under him; and since that statute, therefore, no will could be void by reason of interest arising un-

der it to any attesting witness, further than regarded the interest of such witness or any person claiming under him; and consequently the will was duly attested. To which it was answered that the St. of Geo. II. applied only to cases where the interest taken under the will was destroyed by the statute itself; that the husband took no estate under the will, and by operation of law he in right of his wife derived a beneficial interest from that estate, which they might have sold during her life, and which would have given him an estate by the curtesy if she had survived the life tenant; but that the estate of the wife was not destroyed by the statute, and consequently the derivative beneficial interest, which the husband took in right of his wife only, was not extinguished; and that, independently of the question of interest, it was a general rule that a husband or wife could not in any case be a witness for the other, as was held in Davis v. Dunwoody, 4 T. R. 678. And the court was of opinion that the will was not duly attested. Hatfield v. Thorp, 5 B. & Ald. 589. The point thus adjudged upon the application of the St. of Geo. II. is summed up by Mr. Jarman as follows: "That it applied only when the witness took a direct interest under the will, and not when it arose consequentially. Thus in Hatfield v. Thorp, where one of the three attesting witnesses to a will was a husband of a devisee in fee of a freehold estate, and would *jure uxoris* have derived an interest in the lands, it was held that the devise was not within the statute, and consequently that the attestation was insufficient." And such continued to be the law in England until 1837, when the St. of 1 Vict., c. 26, extended the disqualification to take beneficially under the will to the husband or wife of the attesting witness. 1 Jarman on Wills, 65–67. In neither of the revisions of our own statutes in 1836 and 1860, is any express provision introduced upon this point. Rev. Sts., c. 62, sec. 6; Gen. Sts., c. 92, sec. 6. And the statutes removing the objections to the competency of witnesses on the grounds of interest and of the relation of husband and wife are expressly declared not to apply to attesting witnesses to a will or codicil. Gen. Sts., c. 131, sec. 15; St. 1870, c. 393, sec. 2.

The result is, that the decree reversing the decree of the probate court is to be affirmed, and the

WILL NOT ADMITTED TO PROBATE.

[Compare the following two cases.]

COMPETENT WITNESS.—WIFE OF LEGATEE.

Hawkins v. Hawkins et al.

IOWA SUPREME COURT, 1880.

(54 Ia. 443.)

Rothrock, J.—W. H. Hawkins was directly interested in the will as a legatee, and being a subscribing witness thereto he could derive no benefit therefrom, unless there were two other competent and disinterested witnesses. Section 2327 of the Code provides that, "no subscribing witness to any will can derive any benefit therefrom unless there be two disinterested and competent witnesses to the same."

The only question to be determined then is, was T. C. Hawkins, the wife of W. H. Hawkins, a disinterested and competent witness? That she was a competent witness in the general sense cannot be disputed. By section 3636 of the Code it is provided that "every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, both civil and criminal, except as herein otherwise declared." A married woman, then, is a competent subscribing witness to a will. She is not within any of the exceptions contained in the Code. If it be said that she is not competent to establish that part of the will which makes her husband a legatee, the answer is, by section 3641, the husband or wife are, in all civil and criminal cases, competent witnesses for each other.

Is the wife a disinterested witness? No person offered as a witness is incompetent by reason of his interest in the event of the action or proceeding, except in certain cases. Code, sec. 3638. This section is qualified by section 2327, which requires that a legatee or devisee, who is a subscribing witness to a will, can derive no benefit therefrom unless there be two disinterested and competent subscribing witnesses. Our statute nowhere defines the interest which disqualifies a witness. See the general statute upon the subject. No such definition was necessary, because, as we have seen, interest does not, in general, disqualify. We are, then, to inquire whether, under the common law, modified by our statute making the wife a competent witness, has she such an interest in the legacy given by the will to her husband as to exclude her as a witness? In 1 Greenleaf on Evidence, sec. 386,

it is said: "This disqualifying interest, however, must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself or in the record as an instrument of evidence in support of his own claims in a subsequent action. It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or consanguinity, or any other domestic or social, or any official relation, or any other motives by which men are generally influenced; for these go to the credibility." . . . .

Again, in section 390, it is said: "The true test of the interest is, that he will either gain or lose by the direct legal operation and effect of the judgment. . . . . It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent." See, also, Cutter v. Fanning, 2 Iowa 580.

We think that by these rules the wife was a disinterested witness. She had no present, certain, and vested interest in the legacy given to her husband. It was remote and contingent. It will be observed that this is not a devise of real estate. The will contemplates that whatever real estate there may be shall be sold to pay the legacies. Now the wife has no present, vested interest in such a legacy to the husband. It is his own to dispose of at his pleasure, and there are many contingencies which may intervene to prevent the wife from ever acquiring any part of it.

We think that the wife was a competent and disinterested witness, and that the court erred in excluding her testimony as applicable to the legacy of her husband.

REVERSED.

[Compare the preceding and following cases.]

COMPETENT WITNESS.—WIFE OF LEGATEE.

Winslow v. Kimball.

MAINE SUPREME JUDICIAL COURT, 1846.

(25 Maine 493.)

The opinion of the court was drawn up by

Whitman, C. J.—This is an appeal from the decree of the judge of probate, for this county, approving the will of A. G. Winslow, deceased. The instrument was subscribed as usual by three attesting witnesses. But one of them was the wife of a legatee in

the will. And it is insisted, that this is not a case within the Rev. Stat. c. 92, sec. 5, rendering bequests to subscribing witnesses void, as the wife was not a legatee; and it must be admitted, that, nominally, she was not; and, upon a construction strictly literal, the ground relied upon might be tenable. But statutes are to receive such a construction as must evidently have been intended by the legislature. To ascertain this we may look to the object in view; to the remedy intended to be afforded; and to the mischief intended to be remedied. The object in view in the provision in question clearly was to prevent wills from becoming nullities, by reason of any interest in witnesses to them, created entirely by the wills themselves. No one can doubt, if it had occurred to the legislature, that the case before us was not embraced in the enactment, that it would have been expressly included. It was a mischief of the precise kind of that which was provided against; and we think may be regarded as virtually within its category.

Accordingly, in New York, where the statutory provision, in this particular, is the same as in this State, a devise or legacy to the husband or wife, the other being a witness to the will bequeathing it, is held to be void, upon the ground, as expressed by one of the judges of the court there: "that the unity of husband and wife, in legal contemplation, is such, that, if either be a witness to a will, containing a devise or legacy to the other, such devise or legacy is void, within the intent of the statute"; and upon the ground, that the statute concerning wills should receive a liberal construction, and one consistent with common sense. Jackson v. Wood, 1 Johns. Cas. 163; Jackson v. Durland, 2 Ib. 314.

The decree of the Judge of Probate affirmed.

[Compare the preceding two cases.]

COMPETENT WITNESS.—MEMBER AND PEWHOLDER IN A CHURCH BENEFICIARY.

Warren v. Baxter.

MAINE SUPREME JUDICIAL COURT, 1859.

(48 Maine 198.)

ON AGREED STATEMENT. [Under the will of James Warren, the Methodist Church in Gorham Village was a beneficiary.]

The opinion of the court was drawn up by

Rice, J.—The only question presented for our determination is, whether the will of James Warren was duly attested by three disinterested and credible witnesses.

It is agreed that two of the witnesses to the will, Johnson and Pond, are now, and were at the time of the witnessing of the will, members of the Methodist Episcopal Church and Society, worshipping at the Methodist meeting-house, in Gorham Village, and that each owned one or more pews in said meeting-house, and that the other witness, Bailey, owned a pew in said meeting-house and attended the services there.

It does not appear whether this society was, or not, an incorporated society.

By sec. 2, c. 92, stat. of 1841, wills were required to be attested by "three credible witnesses." By sec. 1, c. 74, stat. of 1857, they are required to be attested by "three disinterested and credible witnesses."

In Massachusetts it has been decided, that the term "credible witness," as used in the statute of wills, means *competent witness*. That is, a witness whom the law will trust to testify before a jury. Amory v. Fellows, 5 Mass. 219; Hawes v. Humphrey, 9 Pick. 361; Haven v. Hilliard, 23 Pick. 10.

As the law stood under the statute of 1841, persons deficient in understanding, and persons having a direct pecuniary interest in the matter in issue, were not deemed competent witnesses, and were not permitted to testify in courts of justice.

The will which is now the subject of controversy was executed Jan. 2, 1858, since the R. S. of 1857 were in operation. The question of the competency of the witnesses to the will is to be determined by their condition at the time the will was executed. Patten v. Tallman, 27 Maine 17.

By sec. 78 of c. 82, R. S. 1857, parties and others having a direct pecuniary interest in the matter in issue are rendered competent witnesses in courts. But, by sec. 80, of same chapter, this provision is restrained, so that it shall not apply to the attestation of the execution of last wills and testaments, or of any other instrument which by law is required to be attested.

The law, therefore, now stands, so far as the question of the competency of the witnesses to the will of the testator is con-

cerned, as it would have stood had the law of 1841 been in force and required the witnesses to the will to be *disinterested* and *credible*.

The interest which will disqualify a person from being a witness must be a present, certain, legal, vested interest, and not uncertain or contingent. 4 Stark. Ev. 745.

The privilege of attending public worship and the advantages of education, although of the highest importance, do not constitute such an interest as will disqualify a witness. Hawes v. Humphrey, 9 Pick. 350.

There is nothing in this case to show that the legal rights of the attesting witnesses, or either of them, is in the slightest degree affected by these provisions in the will. The fact that two of the attesting witnesses were members of the Methodist Episcopal Church and Society, worshipping in the Methodist meeting-house, in the Gorham Corner village, and that all three of them owned pews in that house, does not, of itself, create in them any direct, certain, legal, vested personal interest in the legacy of the testator. It does not appear that there exists in that society any right to tax, or in any way to impose any legal liability upon the witnesses, or that, by their connection with the society, they in any way obtain any rights to the property bequeathed to the society. Their connection with the society may be, and, so far as appears, is entirely voluntary.

The presumption of the law being that all persons of full age are competent to be witnesses, the burden rests on those alleging incompetency to show the fact. That has not been done in this case.

The attesting witnesses are, therefore, within the meaning of the statute, "disinterested and credible," or in other words *competent* witnesses.

Decree of the Judge of Probate affirmed.

[See also Marston v. Judge, 79 Me. 25, where an inhabitant of a town, beneficiary, was held competent.]

CHAPTER IV.

REVOCATION AND REPUBLICATION.

EVERY will is ambulatory during testator's life,—that is, he may freely change or annul it at any time.[1] Changes are effected by codicils, whose purpose is to leave the old will standing at least in part, and to add further, or different, or inconsistent provisions, or to merely annul a portion of the will.[2] But when the entire will is annulled, it is said to be revoked.[3] This revocation may be effected in a number of ways. The subject is covered by statutes, which, in the several jurisdictions, vary a good deal from one another both in the terms in which they are expressed and in the particular provisions for revocation which they enumerate. In each case the local statute must be consulted. The following statement sets forth the leading ways in which a will may be revoked in some or all of our States.

1. Revocation by a subsequent duly executed will.[4] Here there are two classes of cases: first, where the later will *expressly* revokes the earlier, and second, where its provisions are in fact such as to completely supersede those of the earlier.[5] If the later will does not in terms revoke the earlier, and the earlier contains provisions not inconsistent with the later, and not duplicated by

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[1] In order to revoke a will, testator must be of sound mind. Scruby v. Fordham, 1 Add. 74; and not subject to undue influence, Rich v. Gilkey, 78 Me. 595. Undue influence, to nullify revocation, must exist at the very time of the act of revocation. Reichenbach v. Ruddach (Penn.), 18 Atl. Rep. 432.

[2] Sykes v. Sykes, L. R. 4 Eq. 200; Wetmore v. Parker, 52 N. Y. 450.

[3] Sometimes a codicil is so inseparably connected with the will that a revocation of the will necessarily revokes the codicil too. Coppin v. Dillon, 4 Hagg. 361 (369). But this result does not follow if the codicil is of such a character as to be enforceable alone. Tagart v. Hooper, 1 Curt. 289 (294); Gardiner v. Courthope, 12 P. D. 14.

[4] A written will cannot be revoked by a nuncupative will. McCune v. House, 8 Ohio 144.

[5] Re Fisher, 4 Wis. 254.

it, then the later will is really a codicil to the earlier, and the two taken together constitute testator's last will.[1]

2. Revocation by some other instrument in writing executed in the manner prescribed for the execution of wills. This only differs from the preceding case in that here the instrument is devoted exclusively to the declaration revoking the will,[2] and results in revoking the will in whole or in part according to its terms.

REVOCATION BY WRITING.—ESSENTIALS.

Nelson vs. The Public Administrator.

SURROGATE'S COURT, NEW YORK COUNTY, NEW YORK, 1852.

(2 Bradf. 210.)

Bradford, S.—Letters of administration were issued on the estate of deceased to the Public Administrator. Subsequently, four unattested wills, three others apparently duly executed, and several papers of revocation, were discovered. The latest of the executed wills is dated February 3, 1840, and that is the instrument now offered for proof. Its execution is formally proved by the depositions of the subscribing witnesses; but it is urged that it has been revoked. Three of the alleged revocations are wills signed but not attested, and three are mere declarations of revocation, subscribed by the testator, but without the names of subscribing witnesses. They run in this way, "I, James Matheson, etc., do hereby abrogate and revoke all testaments, wills, or codicils I have, or might heretofore have made," etc. "I, James Matheson, who have made and wrote and signed the within, my last will and testament, do hereby rescind and revoke this my last will and testament, and all or any other wills and testaments or codicils of wills, formerly or heretofore made by me," etc. "I hereby rescind and revoke these my last wills and testaments, or any other wills and testaments or codicils of wills formerly or heretofore made by me." The first of these was on a separate sheet of paper, the second on what appears to have been a wrap-

[1] Doe dem. Strickland v. Strickland, 8 C. B. 724 (745). Two inconsistent wills of the *same date* are void for uncertainty so far as inconsistent, in absence of further light as to order of execution. Phillips v. Anglesey, 7 Bro. H. L. Rep. (Bro. P.C.) 443.

[2] 2 N. Y. R. S. 64, sec. 42.

per, and the third on the back of a will executed in 1839. They are all posterior in date to the will propounded for proof. They express, as strongly as anything can, a determination to rescind every instrument of a testamentary character ever executed by the testator; and they express this repeatedly, showing a continued and earnest intention to revoke. They show that the testator supposed the mere writing and subscribing them was sufficient to constitute a present operative act of revocation, and that his will executed in 1840, was not conformable to his subsequent wishes. But notwithstanding this mistaken supposition, and this undeniable evidence of an intention to revoke all wills, the law must govern, though the rules adopted for wise and salutary purposes may seem hard in this particular case. The statute is just as rigid on the subject of written revocations as in regard to the execution of wills. A revocation in writing, to be valid, must be "executed with the same formalities with which the will itself was required by law to be executed." The testator might have revoked by burning, tearing, cancelling, obliterating, or destroying; but he selected the mode of revocation by writing, and has failed in accomplishing his object from want of the necessary formalities. What would be the effect of a written declaration of revocation *upon* an executed will—whether it could be regarded as a present attempt at *cancellation*—it is not necessary to consider; for the will upon which one of these revocations was written is anterior in date to the one propounded. I see no room, therefore, for any argument on the subject: the terms of the statute are clear and unequivocal; the testator has adopted a manner of revocation in which he has failed to comply with the law, and these informal acts have no legal validity. The will must, therefore, be decreed to have been duly proved.

3. Revocation by marriage of testatrix.[1]

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[1] 2 Blackst. Comm. 499. Ellis v. Darden, 86 Ga. 368. In some States the will of a man is also revoked by his subsequent marriage. Ill. R. S. ch. 39, ¶ 10; Va. Code, § 2517. And in others, marriage does not revoke the previous will of either a man or a woman. Ohio R. S., § 5958.

REVOCATION BY MARRIAGE.

Stewart v. Powell.

KENTUCKY COURT OF APPEALS, 1890.

(14 S. W. Rep. 496.)

APPEAL.

Pryor, J.—James Stull, of Webster County, married a Mrs. Burkley, and prior to the marriage entered into a contract fixing the right of property by reason of the marital relation. He gave to her a tract of land and some personal property during life, and at her death he directed by a will written at the same time, that the property should pass to one of his daughters, Mrs. Stewart, then Lily Stull. The marriage was consummated some four or five months after the contract had been entered into, but afterwards annulled by the decree of the chancellor, in which a divorce was granted. In the execution of the will, or as a part of its contents, he "wished the contract carried out and observed," but that contract by a court of competent jurisdiction has been canceled, and the parties left as if the marriage relation had never existed. The will was offered for probate, and rejected in the circuit court, on the ground that the marriage revoked it. The statute provides: "Every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin." In this case, the will and the antenuptial contract were both executed long before the parties became man and wife, nor did the will in any manner affect the rights of Mrs. Burkley under the antenuptial agreement, and the case stands as if the will had been executed prior to the marriage, and in the absence of any contract whatever.

The case of Stewart v. Mulholland, reported in 88 Ky. 38, 10 S. W. Rep. 125, was the will of a woman made at the time of the marriage under an agreement with her husband that it should be made; and while the antenuptial contract, the will, and the marriage were all executed on different days, they were so near each other, and each directly relating to the same matter, that this court held them to be simultaneous transactions. It was the wife's estate disposed of by the consent of her husband, and in

the execution of a power conferred on her by that agreement; in fact the property should be regarded as her separate estate under such circumstances. This court referred to Osgood v. Bliss, 141 Mass. 474, 6 N. E. Rep. 527, and to Will of Ward, 70 Wis. 251, 35 N. W. Rep. 731, under statutes similar to the statute of this State, where the will of the married woman was sustained. We find no ruling to the contrary. The wife, when laboring under the disability of coverture, has no power to make a will, while the husband may at all times, if competent to do so, dispose of his property by will, subject to the right of his wife to such part of his estate as the law gives her at his death; but, as to the wife, she is powerless, unless in the exercise of some power conferred on her, or in the disposition of her separate estate, which, although general estate before the marriage, may become separate estate by reason of an antenuptial contract giving to the wife the power to dispose of it as if she was a *feme sole*. In Stewart v. Mulholland the court was discussing the powers of a married woman to make a will, and did not adjudge in that case that the will was executed before the marriage, but, in effect, held that it was simultaneous with the marriage, and made in pursuance of the contract made by the husband and wife, by which the power to devise was given. The language, in the opinion of Stewart v. Mulholland, to the effect, "the marital right having been settled by their agreement, and no one else being directly or indirectly interested but the husband, why should it be revoked?" was applied to the case then before us, where the *feme* was empowered to make a will that, by the contract, conferred on her the power to dispose of it as her separate property. In our opinion, the marriage in this case revoked the will; and the judgment rejecting the paper as the last will of James Stull is affirmed.

REVOCATION BY MARRIAGE.—STATUTORY RIGHTS OF MARRIED WOMEN.

George A. Emery, Appellant.

MAINE SUPREME JUDICIAL COURT, 1889.

(81 Maine 275.)

FACTS AGREED.

Will of Mrs. Esther Hunt.

Walton, J.—The question is whether the common-law rule,

that the will of a *feme sole* is revoked by her marriage, is now in force in this State. We think it is not. The rule was an outgrowth of the doctrine that the marriage of a *feme sole* destroyed her testamentary capacity. After her marriage she could neither make nor revoke a will. A will already made, if allowed to remain valid, would make a permanent disposition of her property. This would be contrary to the very essence and nature of a will. It would cease to be ambulatory. It was therefore resolved that the marriage of a *feme sole* should, by operation of law, revoke all existing testamentary dispositions of her property. But, in this State, the marriage of a *feme sole* does not now destroy her testamentary capacity. In this particular the common law is not now in force. It has been abrogated by the legislature. A married woman can now make, or alter, or revoke a will, as fully and as freely as if she were not married. Why, then, should her marriage revoke a pre-existing will? We think it should not. *Cessante ratione legis, cessat ipsa lex.* Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself. In England it is now enacted that the marriage of either a man or a woman shall revoke a pre-existing will, unless it is executed under a power of appointment. In New York they have a statute which declares in express terms that the marriage of a woman shall revoke a pre-existing will. In Massachusetts they have a statute which, as construed by the court, has the same effect. Similar statutes exist in several other States. Where such statutes exist, the question we are now considering cannot arise. In other States, where the testamentary laws and the rights and powers of married women are similar to those now existing in this State, it has been held that the marriage of a *feme sole* will not revoke a pre-existing will. It is said in a New Hampshire case that when the incapacity of a married woman to make a will is removed, no reason remains why her will, made before her marriage, should be thereby revoked. Morey v. Sohier, 63 N. H. 507 (2 N. E. Rep. 274). And see Fellows v. Allen, 60 N. H. 439; Webb v. Jones, 36 N. J. Eq. 163. Ward's Estate (Wis.), 35 N. W. R. 731. Carey's Estate, 49 Vt. 236. Our statutes recognize the fact that a will may be revoked by operation of law from a change in the condition or circumstances of the maker (R. S., c. 74, sec. 3), but they are silent as

to what the changes or circumstances are, which shall have that effect. If the marriage of a *feme sole* now, as formerly, destroyed her testamentary capacity, the change in her condition and circumstances would now, as then, also destroy the validity of an existing will. But such is not now the effect of a marriage. In this State, a *feme covert* can make or revoke a will as freely as a *feme sole;* and the reason no longer exists for holding that the will of a *feme sole* will be revoked by her marriage. It will not be. The decree of the probate court holding the contrary was erroneous, and must be reversed.

Decree reversed.

[Also Re Tuller, 79 Ill. 99; Webb v. Jones, 36 N. J. Eq. 163 (165); Fellows v. Allen, 60 N. H. 439 (441); Noyes v. Southworth, 55 Mich. 173; Morton v. Onion, 45 Vt. 145; Carey's Estate, 49 Vt. 236 (250); Miller v. Phillips, 9 R. I. 141.

Compare the case above given with the following case.]

REVOCATION BY MARRIAGE.—STATUTORY RIGHTS OF MARRIED WOMEN.

Brown et al. v. Clark et al.

NEW YORK COURT OF APPEALS, 1879.

(77 N. Y. 369.)

Application for probate. The surrogate of Monroe County denied the application. On appeal his decree was reversed by the General Term, and this appeal was then taken.

Mary J. Clark, the testatrix, executed her will August 25, 1873. She afterwards married, and on October 1, 1877, she died. Several questions were raised on the appeal.

Andrews, J. (After finding that the will was duly executed.)

We concur in the conclusion reached by the surrogate that the will was revoked by the subsequent marriage of the testatrix. It was the rule of the common law that the marriage of a woman operated as an absolute revocation of her prior will. (Force and Hembling's Case, 4 Co. 61.) The reason of the rule is stated by Lord Chancellor Thurlow in Hodsden v. Lloyd (2 Bro. Ch. 534). He says: "It is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix; and as by

the marriage she disables herself from making any other will, this instrument ceases to be of that sort, and must be void." The rule that the marriage of a *feme sole* revoked her will was made a part of the statute law of this State by the Revised Statutes. (2 R. S. 64, sec. 44.) The language of the statute, that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, is the declaration of an absolute rule. The statute does not make the marriage a presumptive revocation which may be rebutted by proof of a contrary intention, but makes it operate *eo instanti* as a revocation. (4 Kent, 528.) It is claimed by the contestants that the testamentary capacity conferred upon married women by the recent statutes in this State takes away the reason of the rule of the common law, and that upon the maxim *cessante ratione legis, cessat lex ipse*, the rule should be deemed to be abrogated. Upon the same ground it might have been urged at common law that the marriage of a *feme sole* should only be deemed a revocation or suspension of her prior will during the marriage, and that when the woman's testamentary capacity was restored by the death of her husband, leaving her surviving, the will should be revived; but the contrary was well settled. (Force and Hembling's Case; 1 Jarman, 106; 4 Kent, 598.) But the courts cannot dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. The married women acts confer testamentary capacity upon married women, but they do not undertake to interfere with or abrogate the statute prescribing the effect of marriage as a revocation. It was quite consistent that the legislature should have intended to leave the statute of 1830 in force although the new statutes took away the reason upon which it was based. The legislature may have deemed it proper to continue it for the reason that the new relation created by the marriage would be likely to induce a change of testamentary intention, and that a disposition by a married woman of her property by will should depend upon a new testamentary act after the marriage.

[The judge here considers the effect of a codicil executed by testatrix after her marriage, and finds that it was effectual to republish the will, and that there was no proof of undue influence.]

All concur.

Order affirmed.

[To the same effect, Swan v. Hammond, 138 Mass. 45; Nutt v. Norton, 142 Mass. 242.

Compare the preceding case given above.]

REVOCATION BY MARRIAGE OF A WIDOW.

Matter of Kaufman.

NEW YORK COURT OF APPEALS, 1892.

(131 N. Y. 620.)

Appeal to the Court of Appeals.

Gray, J.—This will was made by the deceased while she was the widow of one Dillon. She subsequently intermarried with Kaufman and died, leaving him surviving. The executor appointed in this will offered the instrument for probate: but was opposed in his proceedings by Kaufman, who claimed that the will had been revoked by testatrix's marriage with him, and who has been sustained in that claim by the surrogate and the General Term. In their decisions those courts were clearly right, and we should say nothing here, in disposing of this appeal, were it not for the statement that there is no authoritative decision by this court upon the particular question. We should suppose that the case of Brown v. Clark, 77 N. Y. 369, was a sufficient authority in point; although the testatrix in that case was a woman who had never been married at all. For any discussion as to the operation of the acts passed by the legislature of this State in relation to married women and their effect in conferring upon them testamentary capacity, reference may be had to that case.

The appellant attempts an argument upon the meaning to be given to the words "unmarried women" in the statute, and seeks to give substance to it by reference to some cases arising upon the construction of wills and where the discussion bore upon the presumed intention of the testator in his gifts or limitations of property. But such cases can have no influence upon the question of what is accomplished by the Revised Statutes in the provision that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." Pt. 2, chap. 6, tit. 1, art. 3.

It was a recognition of the common-law rule which, in the operation of the statute upon the civil status of the married woman, is unaffected by the enlargement of her legal capacities. At com-

mon law the *feme sole*, in marrying, merged her legal identity in that of her husband. In the unity of person, caused by the marriage relation, the wife lost the control of her property, and hence of her will. Under our statutes that identity of person is only affected, and separate legal capacity is only conferred upon the wife to the precise extent mentioned in the enabling acts. As we have repeatedly held, the common law has been no further abrogated than is read in the statute. Nothing has been enacted which alters the provision that her will is revoked by a subsequent marriage. There is sufficient reason for the continuance of the rule in the changed relations of the woman. Her new status as wife induces the presumption of a new testamentary intention, and demands a new testamentary act. The unmarried woman referred to by the statute must be defined according to that rule of statutory construction which requires that the words used in legal enactments shall be understood and taken in their ordinary and familiar significance. So read, the unmarried woman of the statute is the woman who is not in a state of marriage. That the legislature could have had any other idea is both inconceivable and unreasonable.

The judgment below should be affirmed, with costs to the respondent as against the appellant.

All concur.

[To the same effect, Blodgett v. Moore, 141 Mass. 75; Nutt v. Norton, 142 Mass. 242.]

4. Revocation by testator's subsequent marriage *and* birth of issue.[1] Both conditions must occur to effect revocation; but if testator make provision in the will for future children, then his marriage and their birth will not effect revocation.[2] And so, also, if the will does not dispose of all his property.[3]

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[1] 2 Blackst. Comm. 376; Christopher v. Christopher, 4 Burr. 2182 note; Wellington v. Wellington, Id., at p. 2171; Marston v. Fox, 8 Ad. & El. 14; Gay v. Gay, 84 Ala. 38.

[2] Kenebel v. Scrafton, 2 East 530. (For a history of this class of cases see Chancellor Kent's opinion in Brush v. Wilkins, 4 Johns. Ch. 510.) In wills of real property it was held that the law worked the revocation in this case, and so no evidence of testator's intent was admissible. Marston v. Fox, 8 Ad. & El. 14. But as to personalty, see Fox v. Marston, 1 Curt. 494.

[3] Kenebel v. Scrafton, 2 East 530, 2 N. Y. R. S. 64, § 43.

5. Revocation by subsequent birth of child unmentioned and unprovided for.[1] In some States, the birth of a child after the execution of the will, who is neither provided for nor mentioned, results in a partial revocation of the will so far as to give him the share he would have taken had the testator died intestate.[2] In others the same event results, under some circumstances, in the revocation of the entire will.[3] And sometimes similar provision is made for cases where testator neglects to provide for children even though they are living at the date of the will.[4]

PARTIAL REVOCATION.—POSTHUMOUS CHILD.

John A. Waterman, Judge of Probate, vs. James J. Hawkins et als.

MAINE SUPREME JUDICIAL COURT, 1878.

(63 Maine 156.)

Barrows, J.—One McGlinchy died February 2, 1869, leaving a widow and father to whom he gave property in his will. Two months after his death a posthumous child, for whose benefit this suit on his executor's bond is brought, was born.

The testator devised and bequeathed to his wife, during her life and widowhood, his house and land with the furniture and other personal property on the premises—to become the property of his heirs upon her death or marriage. To his father he gave all his other property, wherever found or situate, specifying all the property in and about his store, and all his horses, wagons, and teams.

The widow seasonably waived the provision made in the will for her, preferring to take her dower and allowance.

On the first Tuesday of May, 1871, the executor settled his first account, showing a balance remaining in his hands not necessary for the payment of debts or expenses of administration, of

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[1] Subsequent adoption of a child does not satisfy this provision. Davis v. Fogle (Ind.), 28 N. E. 860.

[2] 2 N. Y. R. S. 65, sec. 49, as amended L. 1869, c. 22; McIntire v. McIntire, 64 N. H. 609.

[3] For instance, Ohio R. S. § 5959; Ash v. Ash, 9 Ohio St. 383; Evans v. Anderson, 15 Ohio St. 324. See Rhodes v. Weldy, 46 Ohio St. 284; Ind. R. S. (Myers' ed.), § 2560; Bowers v. Bowers, 53 Ind. 430.

[4] Mass. Pub. St. 750, sect. 21.

$557.39. Upon the first Tuesday of June following, the judge of probate under R. S., c. 74, sec. 8, decreed to the posthumous child, as not being provided for in the will, the sum of $371.50, being two-thirds of the balance aforesaid, to be taken from said residuum, which would otherwise have been the share of the testator's father, the residuary legatee. The decree was in precise conformity with the statute provision; for as the widow waived the provision made for her in the will, none of the property, whether specifically bequeathed or not, could pass by the will to the prejudice of the claim of the posthumous child for her share; and under these circumstances that share must, of necessity, all come from that of the residuary legatee. The decree was not appealed from. But upon demand made upon the executor in behalf of the child, he declined to pay over according to the decree, having allowed the property to go into the hands of the legatee before the birth of the child. The presiding judge, to whom the case was submitted, ordered judgment for the penalty of the bond, and execution to issue for $371.50 and interest from the date of the demand and legal costs.

The defendants except, claiming:

I. That the probate judge had no jurisdiction to make the decree, because (they say) the child was provided for in the will, in the clause which gives the reversion of the property devised to the wife, to the heirs of the testator upon her death or marriage; and,

II. That, however this may be, the child's remedy is against the legatee, who has got the property, and not against the executor and his sureties. We are clear that neither point is well taken.

A child of a testator, born after his death, cannot, in any proper sense of the term, be deemed "provided for in his will" by a general devise of a reversion to the heirs of the testator.

There is nothing in such a provision to suggest that the child was thought of by the testator. The form of expression would indicate the contrary. To relieve the judge of probate from the duty imposed in R. S., c. 74, sec. 8, there must be provision made specifically for the unborn child. He cannot be disinherited like a child, or the issue of a deceased child, when it appears that the omission to refer to him was intentional. Unless he is "provided

for," the conclusive presumption is that he was not expected, and the law declares that he shall take the same share of his father's estate as if the father had died intestate. A general devise of a reversion to the heirs of the testator constitutes no such provision. It would rarely be available for the support of the child when support is most needed; and while the insufficiency of the provision in the will might not entitle the posthumous child to claim a distributive share, in order to bar him, it must definitely appear that some provision relating expressly to him was made. Nor can the executor relieve himself, or his sureties, by showing that he incautiously allowed the property to fall into the hands of the legatee. He is responsible first and always for the proper appropriation of the estate to the discharge of all legal claims upon it.

When he settles his account, showing a balance to be legally disposed of according to the order of the judge, it is no sufficient excuse for the non-fulfilment of the decree that he had misapprehended his duty in the premises, and had allowed the property to go where it did not belong. Even though it may have gone wrong with the consent of the judge of probate, founded on erroneous information as to existing facts, it will not relieve the accountant and his sureties who are responsible throughout for the correctness of his doings. Williams, J. v. Cushing, Ex., 34 Maine 370.

Exceptions overruled.

6. Revocation by change of testator's circumstances. This is not properly a separate division of the subject, for it covers by a general term only particular changes of circumstances already mentioned. It is named here because attempts have been made to give it a wider scope.

LAPSE OF TIME.—CHANGE OF TESTATOR'S CIRCUMSTANCES.

Samuel Warner and wife vs. Erasmus D. Beach.

MASSACHUSETTS SUPREME JUDICIAL COURT, 1855.

(4 Gray, 162.)

Shaw, C. J.—This is an appeal by an heir-at-law, against the probate of the will of Clark Cooley. The ground is, that the will was revoked by lapse of time and change of circumstances. These

circumstances are very peculiar in point of fact, and can hardly be expected to occur again.

The testator made his will, in due form and duly executed in May, 1811, and died in 1854. It is not now contended that he was not of sound mind when the will was executed, though it was intimated in the reasons of appeal; but it is found by the case that he soon after became insane, and so continued to the time of his death. When the will was made he had four daughters and two sons, and a third son was soon after born. Provision was made in the will for the child thus expected, in the respective contingencies of being a son or a daughter. By the will, after making provision for his wife, and for a legacy of four hundred and fifty dollars to each of his daughters, he gave all the residue of his estate, real and personal, to his sons. The wife died in the lifetime of the testator, also one of the daughters, leaving children still surviving. These were all the changes which took place in the testator's family. The real estate on which the will may operate remains the same; but has risen in value, by the general advance in the money price of estate, to about twenty thousand dollars, being about four times its value when the will was made. It is remarkable that no greater changes occurred in such a family during so long a course of years.

Our statute of wills, in providing that wills shall not be revoked unless by cancelling, or by another will, etc., excepts revocation implied by law, from subsequent changes in the condition and circumstances of the testator. Rev. Sts., c. 62, sec. 9. What those changes are the statute does not intimate; it is left to be decided by the general rules of law.

Where a partial revocation is set up, arising from a change in the condition of the property devised; as by an alienation of the estate, Hawes v. Humphrey, 9 Pick. 350; or by a change in the devisor's title or interest in it, Ballard v. Carter, 5 Pick. 112; such revocation is easily deduced from the facts of each case, under familiar rules of law. But an entire revocation by implication of law is limited to a very small number of cases. The marriage of a *feme sole* is held to be a revocation of her previous will [see cases on this point, *ante*], or at least a suspension; for there may be some doubt on that point. But in case of a man, a rule has been adopted from the civil law, after some struggle,

but is now firmly established, that marriage and the birth of a child shall be held to be an entire revocation. It is founded on the presumption, that, if the will had been made under the altered circumstances, it would not be made as it was. It might exclude one who would be heir to the whole estate. Even after the rule had gone thus far, it was still regarded as doubtful whether it could extend to a posthumous child. But this, on great deliberation, was held to be within the principle of the rule. Doe v. Lancashire, 5 T. R. 49.

But where the facts, on which such revocation is ordinarily implied, have been contemplated and provided for in the will, no such presumption arises, and the will is not revoked. Kenebel v. Scrafton, 2 East 530.

We state a few of these leading cases, and the principles on which they are founded, to show how far the present case is from coming within the exception of the statute of wills, respecting the revocation of a will by implication of law, from the changed condition of the testator. The death of the wife in the present case could have no effect. She had a life interest only, and the death of a devisee is a contingency always in view. The death of a daughter, under any circumstances, could have no such effect; but in the present case her legacy would not lapse, as she left several descendants, who would take it. Rev. Sts., c. 62, sec. 24. The birth of a posthumous child could have no effect, for his birth was contemplated and provided for by the will; besides, all children not provided for by will, including posthumous children, are provided for by law. Rev. Sts., c. 62, secs. 21, 22. Bancroft v. Ives, 3 Gray 367.

2. The only other circumstances intimated as ground of revocation of this will, are the increase in value of the real estate, and the long-continued insanity of the testator, which disabled him from altering his will. The former circumstance alone would have no weight; and it is only the great length of time, during which this disability lasted, which appears to give it any plausibility. It is said that a will is ambulatory during the life of the testator, because he may at any time alter or change it. If this could be held to mean that he must always have the capacity to revoke, it would follow that any attack of insanity would operate as a revocation, which would prove far too much. And we have no law, no rule or maxim, intimating a distinction in this respect between

the existence of insanity for a longer or shorter period of duration. No case was cited by the counsel, and we are aware of none, where any insanity after making a will is held to revoke the will. In Force & Hembling's Case, 4 Co. 61 *b*, the court, in commenting upon the ambulatory character of a will, to the end of life, suspended in case of a woman who makes a will and marries, and thus by her own act is disqualified by the disability of coverture, say: "It would be against the nature of a will to be so absolute, that he who makes it, being of good and perfect memory, cannot countermand it. But when a man of sound memory makes his will, and afterwards, by the visitation of God, becomes of unsound memory, (as every man, for the most part, before his death is,) God forbid that this act of God should be in law a revocation of his will, which he made when he was of good and perfect memory." This was not an adjudicated point in the case; but it was put by way of illustration, as an unquestionable rule of law, and, as such, is an authority entitled to respect.

The court are of opinion, that the decision of the probate court, adjudging the will of Clark Cooley, under the circumstances, not to have been revoked, was correct, and that the decree allowing and admitting it to probate must be affirmed.

Decree affirmed.

7. Revocation by disposal of property affected. Sometimes a testator having made his will, afterwards sells or gives away real or personal property thereby devised or bequeathed. Such acts of course nullify the practical operation of the will, either in part or in full, but the instrument itself is not thereby revoked.[1]

8. Revocation where the will is burnt, torn, cancelled, obliterated,[2] or destroyed, with the intention of revoking it, either by

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[1] See 2 N. Y. R. S. 65, sec. 48.

[2] Under the Statute of Frauds, *part* of a will might be revoked by obliteration. Swinton v. Bailey, L. R. 1 Exch. D. 110. So under the present English Statute of Wills, if the part obliterated is rendered illegible. Vict., c. 26, § 21. For cases of revocation of *part* by tearing, obliteration, etc., see In Goods of Woodward, L. R. 2 P. & D. 206; Christmas v. Whinyates, 3 Sw. & Tr. 81; Matter of Kirkpatrick, 22 N. J. Eq. 463; Clark v. Scripps, 2 Roberts. 563 (566). But under the present New York statute there cannot be a revocation of a *part* by obliteration. Lovell v. Quitman, 88 N. Y. 377.

testator himself,[1] or, under the terms of the controlling statute, by another for him.[2] As on the other points, the statutes vary in form.

The following instances illustrate general principles equally applicable, whether the method adopted be burning, or tearing, or any other method where the intent to revoke is requisite. They are followed by a statement of a number of principles applicable respectively to the several methods under the present head:

(*a*). Revocation by destroying another instrument. Testator called for his last will, and another was handed him. If he destroyed this, believing it to be his will, with intent to revoke it (which is a question for the jury), then his act revokes the last will.[3]

(*b*). No revocation by any act unless such was the intention. There must be an *animus revocandi*.[4] If testator should tear or burn his will, thinking it to be another paper, and with no intention of revoking his will, there would be no revocation.[5] So, where the testator destroys his will, under a misapprehension;[6] or begins to destroy it and desists before completing the intended act of revocation.[7]

(*c*). It is sometimes said that it requires less capacity to revoke

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[1] If he revokes the will himself by tearing, etc., no witnesses are required for the validity of the act. Timon v. Claffy, 45 Barb. 438.

[2] If the controlling statute requires that where the act of tearing, etc., is done by another, it must be done in testator's presence, this requirement cannot be waived by testator. Goods of Dadds, Dea. & Sw. 290. It is an essential requisite, like the requirement that witnesses must sign "in the presence of the testator"; see *ante*, p. 267 *et seq.*

[3] Pryor v. Coggin, 17 Ga. 444; Smiley v. Gambill, 2 Head. (Tenn.) 164.

[4] In cases where the facts proved are such as to warrant a finding of revocation if such was the *intent*, testator's declarations, made either before or after the act relied on, are admissible on the question of intent. Pickens v. Davis, 134 Mass. 252; Sugden v. St. Leonards, 1 P. D. 154; Matter of Johnson's Will, 40 Conn. 587. Compare also cases on *animus testandi*.

[5] Burns v. Burns, 4 S. & R. 295; and see opinion in Burtenshaw v. Gilbert, 1 Cowp. 49.

[6] As, for instance, if he believed it not properly executed, and, on that account only, tore it up. In Goods of Thornton, 14 P. D. 82; or if he erroneously believed that a later will, intended to supersede the earlier, was duly executed. Onions v. Tyrer, 1 P. Wms. 343.

[7] Doe v. Perkes, 3 B. & Ald. 489.

a will than to make one. This view is probably based on the idea that revocation in itself merely requires a general desire to get rid of a given instrument as a whole, while the making of a will requires the capacity to summon before the mind, as already stated,[1] various groups of facts. In reality, however, revocation practically implies the capacity to summon before the mind, and intelligently pass upon the same facts, the only difference being that in making a will testator must decide what he will do, by affirmative provision, while in revoking it he must decide with equal definiteness, though negatively, that he will not make the particular provisions previously decided on. The better rule appears to be that the test of capacity to revoke is the same as the test of capacity to make.[2]

(*d*). If the intended revocation, though carried out by appropriate acts, is grounded directly on an erroneous assumption of facts, as, for instance, where a later will revokes a legacy contained in a former, on the expressed ground that the legatee is dead, when in fact he is not dead, here, if the mistake as to the essential facts and grounds of revocation appears on the face of the instrument, and is shown by extrinsic evidence to be false, no effect will be given to the attempted revocation.[3] But a distinction must be carefully observed between cases where the revocation is grounded directly on the existence of the supposed fact, and those where it is grounded on *advice* from others that such was the fact, or merely on testator's *belief* that such was the fact, instead of on the fact itself. In these the revocation will be given effect, for the *advice*, or the *belief*, did in fact exist, and on them testator chose to rely.[4]

PAROL EVIDENCE OF INTENT TO REVOKE.

It will be seen that the foregoing ways in which revocation may be effected fall into two classes,—first, where the testator does some act for the very purpose of revoking his will, as, by burning it; and second, where some circumstances occur which, as a

[1] *Ante*, p. 12.

[2] McIntire v. Worthington, 68 Md. 203.

[3] 1 Jarman on Wills, 183; Campbell v. French, 3 Ves. Jr. 321; Doe v. Evans, 10 Ad. & El. 228.

[4] 1 Jarman on Wills, 184.

matter of law, and as a collateral result perhaps not in fact contemplated by testator, produce a revocation, either partial or entire, as, for instance, where, in some jurisdictions, a woman makes a will and afterwards marries.

Now in the first of these classes, *intent* of the testator to revoke his will is a strictly essential element, and although it consists in a mental condition, or an idea in the mind of the testator, yet its existence, or non-existence, is in truth a *fact* to prove which testimony may be admitted. The nature of the act itself, the condition in which the instrument is left, the circumstances attending the act, the expressions of testator and others at the very time, may therefore be shown, in so far as they make up the *res gestae*. All these instances are well illustrated in the following cases. In addition to these facts, parol evidence is also admissible of testator's declarations made even afterwards. But just as, in discussing the admissibility of testator's declarations on the issues of mental incapacity and undue influence, we have already seen[1] that such declarations, in so far as they are not part of the *res gestae*, are admissible, *not* as in themselves evidence of the allegations embodied in them, *but only* as evidence of the state of mind, at the date of execution, of the person making them; so also on the question of *intent* in acts implying revocation, testator's declarations are admissible to show his state of mind in the matter of intent, as a fact, at the time he did the act. But they are not admissible as evidence of whether, having the state of mind shown, he did in fact effect a legal revocation.[2] Thus if he did in reality have the intent to revoke, and did in reality do acts legally sufficient to carry that intent into effect, then his subsequent declarations, no matter how positive, cannot in effect reëstablish the will. But yet his declarations and conduct afterwards may logically go to show that at the time he did the acts relied on as effecting revocation, he did, or did not, have any intent to revoke by those acts. And to this extent and for this purpose evidence of his declarations and conduct is admissible.[3]

[1] *Ante*, p. 211, and cases p. 117.

[2] Staines v. Stewart, 2 Sw. & Tr. 320.

[3] Patterson v. Hickey, 32 Ga. 156; Lawyer v. Smith, 8 Mich. 411; Ford v. Ford, 7 Humph. 92 (104); Boudinot v. Bradford, 2 Yeates 170; see *In re* Weston, L. R. 1 P. & D. 633; Collagan v. Burns, 57 Me. 449; Pickens v. Davis, 134 Mass. 252.

It should be added, however, that the authorities on this subject are conflicting, and that Selden, J., after a careful review of the authorities, in a case in the New York Court of Appeals, laid down the proposition,[1] that on the question of testator's *intent* to revoke, none of his declarations, except such as constituted part of the *res gestae*, are admissible as evidence.

However this may be, the presumption of revocation arising from the fact that a will, once in existence, and under testator's control, cannot be found at his death,[2] may be rebutted by evidence of his subsequent declarations, at the time of his death, going to show that he had not destroyed it with intent to revoke.[3]

NOTE.

For a very full discussion of Revocation, citing and comparing the American statutes and decisions, see notes to Randolph & T.'s Am. Ed. of Jarman on Wills, vol. 3, p. 783 *et seq.*

TEARING UNDER MISAPPREHENSION.

In the Goods of Thornton.

HIGH COURT OF JUSTICE, PROBATE DIVISION, 1889.

(14 P. D. 82.)

The testatrix, Mrs. Jane Thornton, of No. 28, Royal Crescent, Bath, duly executed her last will and testament on July 7, 1885, and subsequently she executed four codicils, bearing date respectively April, 1887; March, 1888; July, 1888; and August, 1888. On March 21, 1889, she made a fifth codicil, which was duly executed and attested. This had been prepared for her by her solicitor, and sent down to her for execution, with blanks left for the date, and in filling up these blanks she inadvertently reversed the day and the month, so that the codicil concluded thus: "In witness whereof I have hereto set my hand this March day of 21st, 1889." Being under the impression that the codicil was thus rendered invalid, she directed her two grandnieces, who were

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[1] In Waterman v. Whitney, given *ante*, p. 84.

[2] See Index, "Lost Will."

[3] Johnson's Will, 40 Conn. 587; Youndt v. Youndt, 8 Grant 140; see the discussion of this subject in Collagan v. Burns, 57 Me. 449.

present at the execution, to tear the codicil into four pieces, to inclose them in an envelope, and send them to her solicitor, in order that he might prepare another copy for her to execute. Mr. Turner, on receiving the letter, pasted the four pieces of the codicil together, and prepared another draft, but the testatrix died before executing it.

Butt, J., admitted the codicil to probate.

[Also Giles v. Warren, L. R. 2 P. & D. 401.]

TEARING WHILE INSANE.

Brunt v. Brunt.

ENGLISH COURT OF PROBATE, 1873.

(L. R. 3 P. & D. 37.)

The plaintiff propounded the will of William Brunt, late of Sidney Street, Commercial Road, Middlesex, publican, dated November 22d, 1869. The defendant did not appear.

(Feb. 12.) SIR *J. Hannen.*—In this case a will was propounded which it was alleged the testator had destroyed when suffering under delirium tremens, that is, when he was insane. The evidence satisfied me that the testator was in an unsound state of mind when he tore up the will; he was suffering from delirium, and therefore not capable of exercising any judgment in the matter. The pieces were collected and put together, so that the will is now restored to the condition in which it was before the destruction. The testator, after the recovery of his senses, expressed regret at what he had done, and said he would make another will.[1] I am of opinion that under these circumstances there was no revocation of the will by destruction. The act done by the testator can in no sense be considered his act, for he was then out of his mind; so that there has never been anything at all amounting to a revocation. After his recovery he expressed regret, and proposed to make a fresh will. The circumstances are exactly the same as those in Borlase v. Borlase.[2] At page 139 Sir H. Jenner Fust says: "The deceased was at the time (of the destruction of the paper) in a state of mental excitement, and

[1] See cases *ante*, on Declarations by Testator.

[2] 4 No. of Ca. 106.

insane, and not master of his actions, and consequently not responsible for his act, as if it had been the act of a competent person; and consequently the attempt at destruction, or even the actual destruction of the codicil, by a person in such a state of mind, has no effect. The pieces of the paper were saved and sealed up in an envelope, with a memorandum setting forth the fact of the tearing by the deceased. This attempted destruction, therefore, cannot have the effect of a revocatory act. The deceased is said to have immediately recovered his faculties, and to have expressed regret at the act. I think this is not improbable, looking at the nature of the attacks he was subject to; but whether or not this be so, whether he did recover himself immediately after or not, if at the time of the attempted destruction he was not of sound mind, the act can have no effect upon the instrument he attempted to destroy; and therefore nothing, it appears to me, can in any way affect the disposition contained in the codicil." I decree probate of the will.

[Also Sprigge v. Sprigge, L. R. 1 P. & D. 608, given *post.*]

DESTRUCTION WITHOUT TESTATOR'S CONSENT.

Trevelyan v. Trevelyan.

PREROGATIVE COURT OF CANTERBURY, 1810.

(1 Phillim. 149.)

EDWARD TREVELYAN, Esq., died at Clifton, on the 13th of September, 1807; no will was found to be in existence at the time of his death, but it was pleaded that his will had been destroyed during his lifetime without his knowledge.

The two following codicils were before the court:

"I bequeath whatever money I die possessed of, as well commissions in his Majesty's service, as whatever may be in my agent's hands, or elsewhere due to me, in share and share alike between my brothers Walter and George Trevelyan after paying my just debts; my fishing rods and dogs to Stackpoole; my curricle and horses to Walter and George, these having to pay my debts; my two colts to Stackpoole. I

of in my former will,
not disposed ∧ the produce of my

and brood mare

desire that Richards my late servant a soldier in the same regiment with myself may have his discharge purchased for him if he wishes it.

"*September* 10*th*, 1807.

"Witness, "ED. TREVELYAN.

"*Ann Bowsher*,

"*Grace Barton*.

"To my late servant Richards, as well as his discharge, I bequeath all the cloaths, regimentals, or otherwise, I may die possessed of; and to Stackpoole my guns.

"*Ann Bowsher*. "ED. TREVELYAN.

"*September* 10*th*, 1807."

Mr. GORDON *deposed*,

"That he was intimately acquainted with the deceased; that to the best of his recollection as to time, on the 22d of June, 1807, he dined at the Rev. George Trevelyan's, at the parsonage at Nettlecombe, and he thinks Miss Lyttelton and Lady Elizabeth Percival were there on a visit, and the deceased was also of the party; when the ladies had left the room after dinner, the conversation turned upon the deceased's brother's, the Rev. George Trevelyan's children, and the deponent observed that Henry Trevelyan, one of them, who was the godson of the deceased and also of the deponent, was a fine child, the deceased agreed with him; after talking for some time of the child, the deponent laughing said, if the deceased would leave Henry his heir, he would leave him also £1,000; the deceased agreed to this, and the deponent called for pen, ink, and paper, and made the deceased's will, and witnessed it. To the best of his recollection the will was as follows:

"'This is the last will and testament of Edward Trevelyan of his Majesty's first regiment of Foot Guards; I give bequeath and devise all my property both real and personal wherever and whatsoever unto my dear godson Henry Trevelyan, the son of my brother George Trevelyan of Nettlecombe, and I appoint the said Henry Trevelyan my godson my residuary legatee.'

"That having made this will, he read the same all over to the

deceased; that the deceased understood it, and approved of it, and set and subscribed his name thereto in the presence of the deponent who also subscribed his name to it as a witness; that during this proceeding the Rev. George Trevelyan reprimanded both the deceased and the deponent for their folly and left the room; that on tea being announced they joined the ladies, and upon entering the room the deceased observed, 'We have made a man of Henry,' and they all laughed, but no one was told of the particulars of the will; that upon the deponent's return to his house he began to reflect that the joke had been carried to a sufficient length, and that it was incumbent on him to destroy the will, supposing the deceased not really serious, and he accordingly destroyed it; that he destroyed it unknown to the deceased, but whether the deceased did or did not remain ignorant thereof till his death he cannot say, as he, the deponent, never affected the least concealment of his having destroyed the same."

WILLIAM STACKPOOLE *deposed*,

"That when the deceased was lying in his last illness at Clifton he was with him, as were also his brother the Rev. Walter Trevelyan and his wife; and Mr. Walter Trevelyan suggested to the deponent the propriety of his brother's making his will; upon which the deponent immediately went into the room and mentioned it to him, to which he replied that he had made his will when he was ill two years before in Somersetshire, which was written out by Gordon, and that it was in favour of one of his brother George's children to whom he was godfather, that Mr. Gordon had compounded in case he made him his heir to add £1,000 to it; to which the deponent replied, the produce of his commission he thought nevertheless undisposed of, or any pay that might be due to him; therefore he took pen, ink, and paper, and drew the first codicil in question." Mr. Stackpoole then proceeded to depose in the fullest manner to the deceased's approbation and signature of the codicil, and continued his evidence thus:

"That the deponent then went into the next room, where were Mr. and Mrs. Walter Trevelyan, and read to them the codicil, when it occurred to the deponent that it made no mention of the will the deceased had often and so lately said he had executed

and left with a Mr. Gordon, and that he had not bequeathed his clothes of which he usually had a great many. He therefore returned to the deceased and put the following questions to him by way of ascertaining his recollection in the presence of Ann Bowsher, his nurse, all of which he had repeatedly solved to the deponent: 'Where is your will? at Edward's?' 'At Mr. Gordon's, a particular friend of George's, in Somersetshire.' 'Is it the will you have before mentioned to me to have been drawn by Mr. Gordon?' 'Yes. The contents I have often told you of'; or words to that effect. 'Is it your intention that this should interfere in any way with that?' 'No; certainly not'; or words fully to that effect. That the deponent immediately made the interlineation 'not disposed of in my former will,' and asked the deceased whether such were his intention; to which he replied, 'Yes.'" Mr. Stackpoole then deposed to the writing and execution of the second codicil of the 10th September, 1807.

Ann Bowsher, nurse of the deceased,

Spoke to the attestation of the two codicils above mentioned.

JUDGMENT.

SIR *John Nicholl.*

There can be no doubt in law that if a will duly executed is destroyed in the lifetime of the testator without his authority it may be established upon satisfactory proof being given of its having been so destroyed; also of its contents.

The question then comes to the facts, and in this case there is abundant proof of the execution and contents of the instrument, as well as of the destruction of it without the authority or knowledge of the deceased. It is not necessary to decide whether the court could receive evidence against the fact of execution on the ground that the transaction was throughout a jest;[1] it would be very dangerous to admit any such evidence of intention against the act; though there might be such a possible case, especially if the paper itself contained anything ludicrous or absurd in its disposition; against this instrument this species of argument cannot be maintained with effect, for the property is bequeathed to the testator's own nephew and godson.

[1] See Nichols v. Nichols, given *ante.*

It appears also from the evidence of Mr. Stackpoole that the deceased was very serious in this disposition of his property; the codicils too are a complete recognition and proof also that he had no knowledge or idea of the destruction of the paper.

Under such proof the court is bound to pronounce for the will "as contained in the deposition of the witness" (this is the mode I believe which has been adopted on similar occasions); and for the two codicils which are sufficiently proved.

ACT OF REVOCATION LEFT INCOMPLETE.

Doe, dem. of S. Perkes, against E. Perkes and others.

COURT OF KING'S BENCH, 1820.

(3 B. & Ald. 489.)

EJECTMENT.

Defendants' title depended on the validity of the will of Charles Perkes, deceased. The will had been duly executed. The question was whether it had been revoked. It appeared that testator, in August, 1816, had a quarrel with a devisee named in the will, and in a fit of passion took the will and tore it twice through. Joseph Worrall, who was present, seized his arms, and the devisee begged testator's pardon and implored him to desist. Testator then became calm, and folded up the will and put it in his pocket. Subsequently he examined it and said he was glad it was no worse. It was torn in four parts. The judge left it to the jury to say whether testator, in tearing the will, had completed all he had intended, or had desisted before doing so. The jury found for the defendants.

W. E. Taunton moved for a new trial.

Bayley, J.—I think this verdict right. If the testator had done all that he originally intended, it would have amounted to a cancellation of the will; and nothing that afterwards took place could set it up again. But if the jury were satisfied that he was stopped *in medio*, then the act not having been completed will not be sufficient to destroy the validity of the will. Suppose a person having an intention to cancel his will by burning it, were to throw it on the fire, and upon a sudden change of purpose, were to take it off again, it could not be contended that it

was a cancellation. So here, there was evidence from which a change of purpose before the completion of the act, might properly be inferred. The jury have drawn that inference, and I see no reason to disturb the verdict.

[*Abbott*, C. J., and *Holroyd* and *Best*, JJ., wrote opinions to the same effect.]

Rule refused.

REVOCATION.—TORN PARTLY THROUGH.

Elms v. Elms.

ENGLISH COURT OF PROBATE, 1858.

(1 Sw. & Tr. 155.)

This was a question as to the intention and fact of revocation of the will of Lieut. Jacob.

The case was argued by the Queen's Advocate (SIR *J. D. Harding*), DR. *Spinks* and MR. *J. D. Welsby* for the legatee.

DR. *Phillimore*, Q. C., and MR. *Coleridge* for the next of kin.

The facts are fully and minutely stated in the evidence of witnesses, as recited in the judgment. As regards the instrument in question being found by Cox in his drawer after Lieut. Jacob's death, it was suggested that the testator, being a man of intemperate habits, had left the will in the pocket of Cox's mackintosh, which he wore when he took leave of Miss Elms, and showed her what he called his will; and that Cox, after Lieut. Jacob had left London for Southampton and India, carried it back with him in the mackintosh to Wales without being aware that it was there.

Cur. adv. vult.

SIR *C. Cresswell.*—This was a question as to whether Lieut. Jacob, late of the Madras Native Infantry, left a will or died intestate. It was admitted on both sides, and on the record, that the deceased in 1856 made a will, which was duly executed as required by 1 Vict., c. 26. But it was alleged by the defendants that he afterwards revoked that will, and that it never was revived. At the hearing of the case there was some discussion as to the party upon whom the *onus probandi* was cast. On that subject the remarks of Lord Brougham in Waring v. Waring, 6 Moore, P. C. 355, are well worthy of attention. He there says:

"The burden of proof often shifts about in the progress of the cause accordingly as the successive steps of the inquiry, by leading to inferences decisive until rebutted, cast on one or the other party the necessity of protecting himself from the consequences of such inferences; nor can anything be less profitable as a guide to our ultimate judgment than the assertion, which all parties are so ready to put forward in their behalf severally, that in the question under consideration the proof is on the opposite side."

Adopting that view of the subject, I will proceed to consider the whole of the evidence in this case, and endeavor to ascertain whether the will, which Lieut. Jacob made in 1856, was afterwards revoked by him or not. The will, as brought into the registry, was written on five sheets of paper, which were attached together by tape at the upper left-hand corner; it appeared to have been folded up in the ordinary form of a brief; it appeared also to have been half-opened, so that the sheets, when attached, were doubled only with the top and bottom edges brought together, and that all the sheets had been torn at the same time from the edge very nearly through, so that only a small portion of each sheet, where it was doubled, held the two parts together; but no one of them was entirely torn through, so as to divide it into two portions. The manner in which it was reduced to that state was not left to conjecture or presumption. Positive evidence was given. It was torn by the deceased, not by accident or mistake, but by design, and the question is, whether he intended to revoke it by so tearing it. The statute 1 Vict., c. 26, s. 20, amongst other modes of revoking wills, mentions "tearing by the testator with the intention of revoking the same." Now, by tearing, I do not understand the legislature to have meant that the testator must rend the will into more pieces than it originally consisted of; and therefore, although no one sheet of paper was completely divided, I think the tearing might be sufficient to revoke, if done with that intention. But, in order to make it effectual, he must have intended to revoke by so tearing it; by which I mean, that he must have intended that which he actually did of itself to have that effect without more. In one sense it may be said that he tore the will with the intention to revoke it, for no doubt he had that intention when he began to tear, and as soon as he had torn it a quarter of an inch he had torn it with intention to

revoke; but he did not intend to revoke it by that tearing only, he intended to tear further.

And this brings me to the same question that was considered in Doe v. Perkes, 2 B. & A. 489. When he ceased tearing, had he done all that he contemplated doing for the purpose of revoking? If he had, the revocation was complete, and he could not recall his act; he could only recall the will by some of the means prescribed by the 22d section of the Wills Act, which he certainly did not adopt. But in order to decide that this will, which was duly made, was afterwards revoked, I ought to be satisfied that the testator did all that the statute makes necessary to work a revocation, viz., that he tore it, meaning by that act without more to revoke it. And here I must refer to some of the evidence given in the cause.

According to Mr. Cox (who was acquainted with the deceased at Caernarvon, and in whose house the deceased was from time to time staying), it appears they were in London together in October, 1856, when the deceased told Cox that he had ordered his solicitor, Mr. Few, to obtain the will from Major Watson, in whose custody it was. Subsequently, in the same month, the deceased received a letter from the post-office at Caernarvon, containing the will. He was then staying at Cox's house. He desired Cox to read the will, and to take care of it for him; Cox accordingly put it in a drawer, and he says it was then in a perfect state. "In May, 1857," Cox says, "we arranged to come up to London together; he told me to put the will in his portmanteau; he told me he was going to make a new will, and that he wished to leave all his money to Miss Elms, and that he should instruct Mr. Few to make one." It appears, however, that circumstances prevented the new will from being then made, and Cox brought back the existing will to Caernarvon, where they returned on the following day. Cox continued: "In June, 1857, the deceased received orders to go to India. I again came up to London with him. Nothing was then said about the will. We stayed two or three days in London and then returned to Caernarvon. The deceased said he came up to make some arrangements about going to India. I remember the 14th of August. The deceased had been drinking almost a pint of brandy that morning. He was on the sofa. He asked me to go up and fetch

his will out of his portmanteau. I did so. As soon as he had it in his hand he ripped it, tore it; as soon as I saw what he was doing, I said, 'Stop, don't do that'—(he did stop); 'if you do so, Miss Elms won't take a penny of your money unless you make another will; and as it is, she will get the greatest part of it.' He said, 'Oh, I shall make another will when we are up in London; I wish her to have it all.' I said, 'If you wish to destroy the will, you had better burn it.' 'No,' he said, 'you burn it.' I said, 'No, I could not do it.' I then asked if he wished to burn the will. He said, 'No, I sha'n't.' I then said, 'I'll take it up-stairs.' I did so; he knew that I took it up-stairs." In answer to some questions which I put, the same witness said: "When he tore it, he either gave it me, or I picked it up off the floor; I can't speak positively; I thought he picked it up; he was on the sofa; he did let it fall out of his hand on the floor; the will was in his hand when I said, 'Stop, don't do that'; it was on the instant. I said it would be time enough to destroy that when he had made another; it was all done at one tear." He further said: "Mrs. Cowlishaw was in the room at the time; the deceased left my house on the 16th of August,—on a Sunday; I went with him to London; we got there on the 17th, and again stayed at the Cross Keys; on the 18th we went to Horsham; the deceased said he went to Horsham to bid Miss Elms good-bye; he saw her; he borrowed my mackintosh; I returned to London with him that day; he told me he had seen her; he seemed very much distressed; he never went out of the Cross Keys till Wednesday evening, when he started for Southampton; I don't know of his having the will with him when he went to Horsham. In September, 1857, I found the will in my drawer; I received a letter from Mr. Few to ask if the deceased had left any papers behind with me; he had burned all the other papers he wished to destroy the day before we last started for London; when we came to the will, I said, 'Here's the will, Jacob'; he said, 'I shall make another will when I go to London'; I put the will in the drawer in his room. When Mr. Few wrote to me I went to find the will, and it was in the drawer in our room; I forwarded it to Mr. Few; I do not know how it came in the drawer where I found it." On cross-examination the witness gave the same account. He added: "When I came back from

Horsham with Lieutenant Jacob, I reminded him that he should make another will; he said, 'I shall, but I have not time now; if I am taken ill on board ship I shall be sure to make my will; I should speak to the captain.'" Mrs. Cowlishaw, a married sister of Cox, who was staying in his house on the 14th of August, says: "I remember being in the kitchen in company with Lieutenant Jacob and Mr. Cox; my husband was in an adjoining parlour; Lieutenant Jacob said to Cox: 'Cox, fetch my will down'; Cox brought it and gave it to Mr. Jacob; Jacob was lying on the sofa at full length; he took the will and appeared as if he would tear it then; he did begin to tear it, and I said, 'Stop'; he tore it a little more; I said, 'Pray, do stay.' Cox also said, 'Don't mutilate it like that, Mr. Jacob; Miss Elms won't get a penny of your money'; he was going to tear it still further, when I said, 'Pray, don't,' and he ceased; he let it fall on the floor; he was still at full length on the sofa; in a few minutes he rose, picked it up, and said, 'I will take it to Cowlishaw, then, to read; he will like to read it.' He then went into the parlour and took the will with him." Mr. James Cowlishaw, the husband of the last witness, said: "I was staying at Cox's in August, 1857. I knew Mr. Jacob there; he frequently spoke to me about his will; he said he intended to destroy that will and make another, and leave the whole of his property to Miss Elms; that he intended Major Watson's daughter not to have the £1,000 he had left her. He said he should not leave his brother and sisters anything. On the 14th of August I was sitting in the parlour reading; my wife and Mr. Cox were in the kitchen. Mr. Jacob came into the parlour, followed by Cox; he said to me, 'Cowlishaw, there is my will; read it.' I did so far that I could ascertain to whom he had left his money; he had left a legacy of £1,000 to the little girl, and the whole of the rest to Miss Elms. I handed it back to him; he said, 'I mean to destroy this, and make another in favour of Miss Elms.' Myself and Mr. Cox said, 'If you leave it in this mutilated state, there will be a bother about it.' Mr. Cox suggested to put it in the fire in the back kitchen. Jacob asked me to do so. I said, 'No, it is a serious matter: I can't interfere.' Lieutenant Jacob refused to burn it, and Cox said, 'Well, Jacob, if you won't destroy it, I'll take it up-stairs again.' He did so. Jacob had been drinking that morning brandy; he was not drunk,

he knew what he was doing." Miss Elms deposed: "I remember his coming down on the 18th of August before he went to India. I saw him; he said he was going to sail; he produced a paper from the pocket of the coat he had on; he said it was his will. He partly opened it, and showed part of the writing; I think I saw my name, but I am not sure. I did not see his signature; he said it was a will made in my favour, and wished me to keep it. I refused. I did not observe whether it was torn; he opened it very partially." (On the will being shown the witness), "It is the same colour as the paper I saw; it was doubled up. I thought it was a journal when he produced it." The act of dropping or casting it on the floor was no doubt relied on in consequence of the *dictum* of Best, J., in Doe v. Perkes; but the learned judge must not be supposed to have ascribed to the act of throwing the torn will on the floor any other operation than that of showing that he had done all that he intended to do. But there his hand had been arrested, and if I am to place implicit reliance on Mrs. Cowlishaw's evidence in this case, the testator was about to tear further, when she stopped him; the appearance of the paper confirms that. He had torn the will so nearly through, that one cannot but conjecture that he meant to effect a severance of the parts; but that remained unaccomplished, and I find nothing in the case upon which I can assume any other state of facts than that which Mrs. Cowlishaw describes. Her memory may be imperfect; but assuming it to be so, what other evidence have I before me? By what testimony has any other state of things been established? The brother's evidence is not quite so full, but it leads to the same conclusion.

I do not place reliance on what passed afterwards,—viz., that when he burnt other papers, he preserved the will, and that he showed it to Miss Elms as his will. If it had appeared that he knew that the will once torn with intention to revoke was thereby revoked, the preservation and subsequent exhibition of it to Miss Elms would have tended to show that he knew it had not been revoked, or, in other words, that his hand had been arrested in time, and that he had never completely revoked it; but he very probably supposed that, as long as no parts of the will had been destroyed, it would still be valid, although torn with intention to revoke, and therefore the preservation of it is too equivocal an

act to be relied on in forming any judgment upon this very nice question. But putting that out of consideration, upon the whole of this evidence, dealing with it, as if I were a juryman, I say that I am satisfied, that the instrument brought into the registry was duly executed by the deceased Lieutenant Jacob as his last will and testament, and I am not satisfied that it was revoked by him. I must, therefore, pronounce for the will, and grant probate of it.

INTENTION TO REVOKE, BUT NO ACT.

Mundy v. Mundy.

NEW JERSEY PREROGATIVE COURT, 1858.

(15 N. J. Eq. 290.)

Application for probate.

The application was denied by the Orphans' Court, and this appeal was taken.

Two principal questions were involved,—whether the will had been duly executed (which is here found in the affirmative), and next, whether it had been revoked.

THE ORDINARY. (After finding that testator was competent to make a will.)

There was some testimony taken also in reference to the cancellation of the will. A witness says, "I was at his (testator's) house fifteen years ago, and Mr. Mundy asked his wife for the will, and she said it was at Piscataway-town; she said to Mr. Mundy, what do you want of it? he said, I want to burn it up; she said, it is at Piscataway-town; she said, when I go down there I will get it; when she came home, he asked her if she had got the will—she said not—what do you want of it? I want to burn it up, he said; she said, I have burnt it up; that was about fifteen years ago." If implicit confidence could be placed in the testimony of this witness, it would not affect the validity of the will. The will was not burnt up. The testator ought not to have relied upon the declaration of his wife. If he had seriously desired to cancel the will, he could have done it without having the will in his possession. The will could be cancelled in no other way than by its being burned, cancelled, torn, or obliterated by the testator himself, or in his presence

and by his direction and consent, or by a revocation in writing, executed in the same manner as wills are required to be executed. This will was neither cancelled or revoked in the manner directed by the statute.

(Here follows the consideration of the execution of the will.)

The decree of the Orphans' Court of the county of Middlesex must be reversed, and the will be admitted to probate. Letters may be taken out in this court, or the proceedings may be remanded, and letters taken out in the court below.

TEARING.—SURREPTITIOUS PRESERVATION.

Sweet v. Sweet.

SURROGATE'S COURT, OSWEGO COUNTY, NEW YORK, 1863.

(1 Redf. 451.)

Application for probate.

Hull, S.—From the testimony, it appears that in 1861, deceased made a will devising his homestead to his wife; and after making liberal bequests to her, according to his means, and ample provision for his children, he gave certain small specific legacies to his mother, and his brothers and sisters.

In the fall of 1862, he was taken ill with pulmonary disease, and after being sick a few weeks, on the 3d of Nov., 1862, while confined to his bed, made a codicil revoking all the provisions of his will, and giving all his property, real and personal, to his wife. It appeared that there were several grave irregularities relating to the execution and publication of the codicil, to which it will not be necessary to refer, for the reason that another point in the case was raised of more vital consequence to the validity of the instrument than the irregularities relating to its execution.

From that part of the testimony concerning which there was a conflict or dispute, it appeared that about one week after the codicil was executed, and while the deceased was confined to his bed, he requested his wife to hand him the will. She at first declined. He told her that he wanted to see the man that drew it, and his brother, the executor. She finally handed him the paper. He took it in his hand, and holding it up before him, tore it into some ten or twelve fragments, and left the pieces on

the bed. He then attempted to get up, but was prevented by the petitioner. He became excited and somewhat exhausted by the effort.

She gathered up the pieces and put them in a desk, without the knowledge of the deceased, and locked the desk, where the paper remained in the same condition until after the deceased was buried.

The will and codicil and certificates of the witnesses were written upon one sheet of paper. When presented for probate, the several pieces had been sewed together by thread, in such an ingenious manner that the paper was perfectly legible.

It appears in evidence that the deceased did not know that the fragments of the paper were preserved; that afterwards, he frequently spoke of having torn up and destroyed his will, and expressed a desire to recover his breath, that he might be able to make another will.

In one conversation, while talking about a will, the petitioner remarked, "You have no will"; and the deceased replied, "I should have had another drawn, if my friends had not advised me not to."

The only testimony tending to show unsoundness of mind at the time of the destruction or revocation of the will, was that of the witness, who testified that deceased appeared excited, and wanted to get up and put on his clothes, and made use of singular language to his daughter respecting the petitioner.

On the contrary, the attending physician testified that he saw nothing indicating insanity or unsoundness of mind in the deceased; that in talking with him soon after the will was torn to pieces, he appeared to be perfectly rational; said the reason that he had torn it up was, there were others that he wished to benefit besides Julia—the petitioner.

A number of other witnesses corroborated the physician. From all the testimony, it is evident that the deceased died with the belief that his will had been utterly destroyed, and that no part of it was in existence.

Was this a revocation of the will within the meaning of the Revised Statutes?

The statute prescribes that a will may be revoked—1st. By another will in writing; 2d. By some other writing of the testator,

declaring such revocation or alteration, executed with the same formalities with which the will itself is required by law to be executed; 3d. By burning, tearing, cancelling, obliterating, or destroying the instrument, with the intent and for the purpose of revoking the same; 4th. By marriage, or changes in testator's condition in life. (2 Rev. Stat. 64.) Under the third requisite of the statute, in order to make the revocation complete, the act must be done *animo revocandi.* The mere act of tearing or cancelling is not sufficient. (Jackson v. Halloway, 7 Johns. 394; Jackson v. Pattie, 9 Id. 312; Smith v. Hart, 4 Barb. 28; Nelson v. McGiffert, 3 Barb. Ch. 158; Perrott v. Perrott, 14 East 423; Willard on Ex. 123.)

In this case, the tearing and obliteration and destruction of the instrument was as complete as the deceased had the power of making it, in his then state of health. He saw it lying about him in scattered fragments, evidently to him appearing so badly torn as to be incapable of restoration. His language before tearing the paper, and his subsequent conversation, clearly indicate his purpose at the time to be, to make a complete revocation of the instrument.

The restoration of the instrument into a legible form was no act of the deceased. He saw it in pieces, scattered about the room. He expressed himself satisfied that it was no longer in existence, and died in the full conviction that he had left no will.

With this view of the evidence, I must refuse to admit the instrument to probate.

BURNING.—SURREPTITIOUS PRESERVATION.

Esther White against James Casten and Wife.

North Carolina Supreme Court, 1853.

(1 Jones L. 197.)

This was an issue *devisavit vel non*, as to a script purporting to be the will of Thomas J. White, propounded by Esther White, his widow, and opposed by James Casten and his wife, tried before his Honor Judge Ellis, at Fall Term, 1853, of Chowan Superior Court.

His Honor Judge Ellis instructed the jury that the acts de

posed to amounted to a revocation under the statute, if done with an intention to revoke.

Verdict for Casten. Motion for a *venire de novo*. Motion refused and appeal to this court.

Nash, C. J.—The question for our consideration arises under the act of the General Assembly concerning the revocation of wills. Rev. Statute, ch. 122, sec. 12. By that section, it is provided, "that no devise in writing, etc., or any clause thereof, shall be revocable, otherwise than by some other will in writing, or by burning, cancelling, tearing, or otherwise obliterating the same, etc." This provision is almost in the exact terms of the Statute of Frauds, in England, passed the 29th of Charles the Second. It was stated at the bar, in the argument here, that the true construction of the 29th of Charles, upon the question raised here, was in England still unsettled, and that there was no adjudication by this court, which was a direct authority. This is so, and we must endeavor to extract from the conflicting English authorities, and our own cases which have a bearing upon the question, that rule which appears to us most consonant with the statute and to reason. Revocation is an act of the mind, demonstrated by some outward and visible sign or symbol of revocation. No act of spoliation or destruction of the instrument will, under the statute, revoke it, unless deliberately done, *animo revocandi*. Thus, if a testator, intending to destroy papers of no value, ignorantly and without an intention to do so, throws his will into the fire, and it is consumed, or by accident tears off the seal, it is no revocation. The difficulty lies in ascertaining how far the symbol of revocation must extend. As to the burning, must the will by it be literally destroyed, in whole or in part? or must any portion of it be *actually* destroyed? It is upon this point that the English cases differ. The first case to which our attention was directed, was that of Mole and Wife v. Thomas, 2nd Sr. William Blackstone, Rep. 1043. The case was: Palin, the deceased, being sick in bed, near the fire, ordered his attendant, Mary Wilson, to bring him his will, which she did. He opened it, looked at it, and tore a bit of it almost off, then crumpled it in his hand and threw it on the fire. It fell off, and Mary Wilson took it up and put it in her pocket. Palin did not see her take it up, but had some suspicion of the fact, as he asked her what she was at, to which she made little or

no reply. The court ruled that it was not necessary that the will or the instrument should be literally destroyed, or consumed, *burnt* or torn to pieces. Throwing it on the fire, with an intent to burn, though it is but very slightly singed, and falls off, is sufficient within the statute. The case does not inform us to what extent the fire had made an impression on the paper; it must have been very slight. The authority of this case is said to be shaken by what fell from the Chief-Justice, DENMAN, in the case of Reed v. Harris, 33rd E. C. L. R. 60 [6 Ad. & El. 209, given *post*]. In commenting on the case of Mole and Wife, he observes: "Doubt might be entertained now, whether the proof there given would be sufficient as to them," meaning burning and tearing. High as this authority is, we are not inclined from the expression of a doubt to set aside the deliberate and united opinions of Chief-Justice DE GREY, GOULD, BLACKSTONE, and NARES. But, in that very case, both PATTESON and COLERIDGE stated, there must be a partial burning of the instrument itself, and that any partial burning will destroy it entirely. But independently of this, the case of Mole v. Thomas is recognized by writers of the highest authority. Mr. POWELL, at page 596 of his Treatise of Devises, says: "Upon this principle, it has been held, that if any of these acts, viz.: tearing, burning, etc., be performed in the *slightest* manner, this, joined with a declared intent, will be a good revocation, because the change of intent is the substantive act, the fact done is only the sign or symbol, by which that intent is rendered more obvious." He then cites the case of Mole v. Thomas, as his authority. See also 1st Jarman on Wills, 115 to 119; Lovelace on Wills, 347. They both cite from Sir Wm. Blackstone, and refer to the case of Reed v. Harris, as showing that the singeing of the cover of a will is not a burning of the will, but that there must be a partial burning of the will itself. Thus stand the cases in England on this question, and upon the authority of Mole v. Thomas, Judge Kent, in the fourth volume of his Commentaries, page 532, says: "Cancelling in the *slightest* degree, with a declared intent, will be a sufficient revocation, and therefore, throwing a will on the fire, with an intent to burn it, though it be but slightly singed, is sufficient evidence of the intent to revoke," and for this he cites Mole's case. So GREENLEAF, in his first volume on Evidence,

349, states, that when a testator crumpled his will, and threw it on the fire, with an intent to destroy it, though it was saved entire, without his knowledge, it would be a revocation, and refers to Mole's case to sustain him. See 5th Conn. R. 168, Card v. Grinman. By a large majority of these authorities, it appears that the case in BLACKSTONE is sustained, and approved. The intent with which the act is done by the testator, must continue through the act; otherwise it will not be a revocation, as where a testator, upon a sudden provocation by one of the devisees, tore his will asunder, and after being appeased, fitted the pieces together, and expressed his satisfaction that it was no worse, it was held to be no revocation. Here the intent to revoke was itself revoked before the act was complete. Doe and Perkes, 5th Barn. and Ald. 481 [given *ante*]. The case of Hise v. Fincher, 10 Iredell 130, which was referred to, does not govern this. There the testator, who was sick in bed, directed his son to throw his will into the fire; instead of doing so, he, without his father's knowledge, threw another paper in. This was adjudged, and certainly very correctly, to be no revocation. The directions given were accompanied by no act or symbol on the part of the testator, expressive of his intention to revoke: his intention rested only in words.

The principle which we would extract from the cases cited, is, that where the revocation of a will is attempted by burning, there must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol, appearing on the script itself, so that it may not rest upon mere parol testimony, and if the script is in any part burnt or singed, it is sufficient to revoke the will. Let us now try this case by this principle or rule.

The case states, that the testator threw the will into the fire, with the intent to revoke and destroy it; that, after he had done so, he turned away, when the plaintiff, his wife, took the paper from the fire secretly, and concealed it in her pocket; that the testator, up to his death, thought the will was destroyed, and so frequently expressed himself. The writing was upon a single sheet of paper, which was burnt through in three places, one near either extremity, and in the crease formed by the folding of the paper. It was also singed at the outer edges, and scorched on the outside or back; that this was done when the paper was thrown

on the fire. No word or letter of the writing was in any manner destroyed or obliterated by the burning, and the paper itself but little disfigured, and in no wise injured, except as above stated.

It will be at once seen that this is a stronger case than that of Mole v. Thomas. There the script was barely singed; here it is burnt through in three different places, the outside scorched, and the edges of the paper singed. We are therefore clearly of opinion that the will was revoked: there was the present intent to revoke—the act of throwing on the fire with that view, and the symbol impressed upon the script itself. There was no halting in the intention of the testator, between the commencement and the completion of the act; for, to the time of his death, he believed the will was destroyed.

It is seen from the cases cited, and the rule we have laid down, that the much or little of the burning of the script is not material, and when the reason of requiring the symbol to be impressed on the script is considered, it cannot be important. The symbol is nothing but the act showing the intention of the testator, and when that appears on the paper, the evidence from the act is complete, and the testator has completed his intention. It would be singular, that, if the slightest burning of a house, on an indictment for arson, should be sufficient to take the life of the incendiary, as it is, that a similar burning should not, in a civil case, be sufficient to revoke a will. The language upon this point, in the act taking away the benefit of the clergy, is the same as in the act we are considering. Rev. Stat., ch. 34, s. 7: "If any person shall willfully and maliciously *burn*," etc. If any portion of the building is burnt, it is sufficient to bring the case within the statute.

Judgment affirmed.

TEARING.—NO *ANIMUS REVOCANDI.*

Giles and Clark v. Warren and Others.

ENGLISH COURT OF PROBATE, 1872.

(L. R. 2 P. & D. 401.)

The plaintiff propounded the will of Daniel Giles, of Hackney, Middlesex, dated November 24, 1866. Due execution was proved. Having gained a belief, from talking with a Mr. Hillstead, that the

will was invalid, testator tore it in pieces as useless. Soon after, thinking his belief might be erroneous, he picked up and preserved the pieces.

Lord *Penzance*.[1]—I think in this case there was no revocation. The fact that a testator tears or destroys his will is not itself sufficient to revoke one properly executed. That is to say, the bare fact. If, for instance, he tears it imagining it to be some other document, there would be no revocation, for there would be no *animus revocandi*. He must intend by the act to revoke something that he had previously done. There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will. Revocation is a term applicable to the case of a person cancelling or destroying a document which he had before legally made. He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it. According to the evidence the testator, in consequence of some conversation he had had with Hillstead, was under the impression that he had made no valid will, and, as being useless, he tore the document up and threw it on the fire. That is no revocation. What happened afterwards was not material. If the will had been once revoked, the testator could not set it up again by subsequent declarations.

BURNING SURREPTITIOUSLY PREVENTED.

Doe dem. Reed against Alice Harris.

Court of King's Bench, 1837.

(6 Ad. & El. 209.)

Ejectment.

The lessor of the plaintiff claimed as heir, the defendant as devisee of John Reed. The question was whether a certain will of John Reed had been duly revoked.

The testator, an old and infirm man, died December 31, 1834. The learned trial judge (Patteson) stated to the jury that if they believed the evidence of Esther Treharne, and were satisfied that the testator threw the will on the fire intending to burn it, that Alice Harris took it off against his will, that he afterwards insisted

[1] Sir J. P. Wilde, judge of the Court of Probate, was on April 6, 1869, created Baron Penzance.

on its being thrown on the fire again, with intent that it should be burnt, and that she then promised to burn it, there was a sufficient cancellation within the statute. Verdict for plaintiff. Rule *nisi* for new trial on ground of misdirection.

Chilton and *James* now shewed cause.

John Evans and *E. V. Williams*, *contra*, were stopped by the court.

Patteson, J.—I am quite satisfied that I left this case wrongly to the jury. I did not see the distinction between the present case and Bibb dem. Mole v. Thomas,[1] as I ought. There something had been done which the court considered to be a burning and a tearing of the will. [In that case,] The testator is described, not as merely having done something to the corner of the will, but as having given it "something of a rip with his hands," and so tore it "as almost to tear a bit off." It is plain that, on the production of the instrument, it would appear (though I do not think that important) that there had been some tearing of the will itself. As the act says that there must be a tearing or burning of the instrument itself, a mere singeing of the corner of an envelope is not sufficient. To hold that it was so would be saying that a strong intention to burn was a burning. There must be, at all events, a partial burning of the instrument itself: I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the will is. I am quite satisfied that I was wrong in my direction to the jury.

Opinions to the same effect were rendered by Lord *Denman*, C. J., and *Coleridge*, J.

Rule absolute.

ONLY SLIGHT BURNING.

Bibb on the demise of Mole and Wife v. Thomas.

English Court of Common Pleas, 1776.

(2 Wm. Blackstone 1043.)

Ejectment.

On trial before Hotham, Baron, the question was, whether a will made by one William Palin was duly revoked. It appeared in evidence that Palin (who had for two months together frequently

[1] 2 W. Bl. 1043 ;. given *post*.

declared himself discontented with his will), being one day in bed near the fire, ordered Mary Wilson, who attended him, to fetch his will, which she did, and delivered it to him; it being then whole, only somewhat creased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as almost to tear a bit off; then rumpled it together, and threw it on the fire; but it fell off. However, it must soon have been burnt, had not Mary Wilson taken it up, and put it in her pocket. Palin did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at, at which she made little or no answer. He at several times afterwards said, "That was not and should not be his will," and bid her destroy it. She said at first, "So I will, when you have made another"; but afterwards, upon his repeated enquiries, she told him she had destroyed it (though in fact it was never destroyed), and she believed he imagined it was so. She asked him, when the will was burnt, whom his estate would go to? He answered, to his sister and her children. He afterwards told one J. E. that he had destroyed his will, and should make no other till he had seen his brother John Mills, and desired J. E. would tell him so, and that he wanted to see him. He afterwards wrote to Mills in these terms: "Dear brother, I have destroyed my will which I made, for upon serious consideration I was not easy in my mind about that will." Afterwards desires him "to come down, for if I die intestate it will cause uneasiness." He, however, died without making any other will. The jury, with whom the judge concurred, thought this a sufficient revocation of the will, and therefore found a verdict for the plaintiff, the lessee of the heir-at-law.

Grose moved for a new trial, because this was not a sufficient revocation within the statute of frauds.

Davy and *Adair* shewed cause.

And *per tot. Cur.* (*De Grey*, C. J., *Gould*, *Blackstone*, and *Nares*, JJ.)—This is a sufficient revocation. A revocation under the statute may be effected, either by framing a new will amounting to a revocation of the first, or by some act done to the instrument or will itself, viz., burning, tearing, cancelling, or obliteration and consent. But these must be done *animo revocandi*. Onyons and Tryers [Onions v. Tyrer];[1] Hide and Hide [Hyde v. Hyde],

[1] 1 P. Wms. 343.

1 Equ. Cas. Abr. 409. Each must accompany the other; revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has specified four of these; and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will, or instrument itself, be totally destroyed or consumed, burnt, or torn to pieces. The present case falls within two of the specific acts described by the statute. It is both a burning and a tearing. Throwing it on the fire, with an intent to burn, though it is only very slightly singed, and falls off, is sufficient within the statute.

Rule discharged.

SIGNATURE TORN OFF.

In the Goods of Samuel William Lewis (deceased), on Motion.

ENGLISH COURT OF PROBATE, 1858.

(1 Sw. & Tr. 81.)

The deceased, in this case, died on the 22d of December, 1857; on the 15th of the same month, being then in extreme illness, he requested his cousin, Robert Lewis, to prepare a will for him, which was accordingly done, and the will was duly executed; it was then, by the deceased's desire, delivered to his mother, Rebecca Lewis, who retained possession of it till the 21st of December, when, at the deceased's request, she redelivered it to him in the same state as it had been delivered to her after the execution. On the following day the deceased died, and whilst his body was being laid out, the will was discovered under the bolster of the bed upon which he was lying, but that part of it which had contained his signature, and the attestation clause and signature of the subscribing witnesses, was torn off and could not be found. The deceased, after executing his will, expressed his satisfaction at having done so to Robert Lewis, who continued in attendance upon him till his death. It did not appear that the deceased, in any way, mentioned the subject to any other person. Under these circumstances his widow, who was appointed executrix of the will, wished to take the opinion of the Court of Probate.

DR. *Waddilove* moved the court to decree probate of the paper

to the widow as executrix therein named, but presumed that the court would feel itself unable to do so.

Sir *C. Cresswell:* I must, of course, reject your motion. The widow is entitled to a grant of letters of administration of the goods of the deceased as dead intestate.

[Though a seal is unnecessary, yet, if the will states that it is "signed and sealed," tearing off the seal may suffice to revoke it. Price v. Powell, 3 H. & N. 341; see Will of White, 25 N. J. Eq. 501. For other acts of tearing, Williams v. Tyley, Johns. (Eng.) 530.]

SIGNATURE SCRATCHED AWAY.

In the Goods of Henrietta G. Morton.

High Court of Justice, Probate Division, 1887.

(12 P. D. 141.)

Henrietta G. Morton, late of Newcastle-on-Tyne, deceased, died January 26, 1887, having duly executed a last will bearing date September 16, 1853. After her death the will, which had remained in her possession, was found in a trunk with the signatures of the testatrix and the attesting witnesses scratched out as if with a penknife. At the bottom of the will there was a memorandum in the handwriting of the deceased, dated "November, Saturday, 1861"—but not executed—whereby for reasons given the will was declared to be cancelled.

Butt, J.—I do not think there is any difficulty in the case. What the testatrix did may be regarded as lateral cutting out. The paper is not pierced, but the signatures are scratched away. I think the will has been revoked, and I grant administration to the applicant.

[So cutting out the signature: Hobbs v. Knight, 1 Curt. 768.]

CANCELLATION OF SIGNATURES.

Semmes vs. Semmes et al.

Maryland Court of Appeals, 1826.

(7 Harr. & J. 388.)

Appeal from a decree of the Orphans' Court of Charles County, refusing to admit to probate and record a paper offered as the last will and testament of Ignatius Semmes, deceased.

The cause (which is sufficiently explained in the opinions delivered by this court) was argued before *Buchanan*, Ch. J., and *Earle*, *Martin*, *Stephen*, *Archer*, and *Dorsey*, JJ.

Buchanan, Ch. J., delivered the opinion of the court. It is objected, on the part of the appellant, that the Orphans' Court did wrong in not admitting to probate a paper, purporting to have been a duly executed will of Ignatius Semmes, on two grounds: *First*, Because the obliterating the name of Ignatius Semmes, and also the names of the three subscribing witnesses, does not appear to have been done by the deceased; and, *secondly*, That if it was, it did not amount to a revocation of the will.

With respect to the first proposition, it does not appear to admit of a doubt, that each obliteration was made by the deceased, Ignatius Semmes.

The *memorandum* at the foot of the paper, and just below the signatures, in these words: "In consequence of the death of my wife, it is become necessary to make another will," and signed Ignatius Semmes, is admitted to be in his handwriting. The obliterations were made by drawing a pen frequently, and in different directions, across his own signature, and the names of the subscribing witnesses; and the ink with which it was done, is proved to have been the same with which the memorandum at the foot of that paper was written. Hence it is manifest, that the obliterations, and the memorandum, were simultaneous acts, and by the deceased himself; and it would be straining overmuch to admit the supposition, that it might have been surreptitiously done by another, in the absence of any testimony to cast the slightest shade of suspicion upon anybody. The memorandum must be considered as connected with the obliterations as a part of the *res gestae*, and as explanatory of the transaction. It is equivalent to a declaration, that he had made the obliterations, for the reasons assigned (the death of his wife), which made it necessary to make another will.

Considering then the obliterations to have been made by the deceased, the second objection presents itself, to wit, that the will was not thereby revoked; in support of which several authorities were cited and relied on in argument, but none of them sustain the proposition, and it would be somewhat strange if they did.

In Onion vs. Tyrer, 1 P. Williams 343, the deceased, by a wil

duly executed to pass real estate, devised lands to trustees, to certain uses, and afterwards made another will devising the same lands to other trustees, but to the same uses, with a clause of revocation of the first, and attested by three witnesses, who did not sign their names in the presence of the testator. Supposing the second will to be duly executed to pass real estate, the testator caused the first to be cancelled. But it was determined, that the witnesses to the second, not having signed their names in the presence of the testator, it was void as to the land, and could not therefore have the effect to revoke the former; and the cancelling of the first will, under the presumption that the second was good and effectual, was held not to amount to a revocation of it, on the ground that it was done by mistake. The case of Hyde vs. Hyde, 8 Vin. Ab. 142, was clearly a case of mistake. And the case of Mason vs. Limbrey, cited by Lord *Mansfield*, in 4 Burr. 2515, was decided on principles not at all applicable to this case.

The cancelling of a will is said to be an equivocal act, and not to effect a revocation, unless it is done *animo revocandi*. And where it is a dependent relative act, done with reference to another, which is meant and supposed to be good and effectual, it may be a revocation or not, as that to which it relates is efficacious or not. As where a man having duly executed one will, afterwards causes another to be prepared, and supposing the second to be duly executed, under that impression alone cancels the first. In such case it has been held, that on the second turning out not to have been duly executed, the cancelling the first, being done by mistake and misapprehension, would not operate as a revocation.[1] But never where a man has deliberately and intentionally cancelled his will, as in this case, in the entire absence of all accident or mistake, notwithstanding he may, at the time, have intended to make another will.

It is said, and indeed it would seem from the testimony, that Ignatius Semmes did not intend to die intestate, but however that may be, we cannot make a will for him. By the will, which is now attempted to be set up, he had disposed of the whole estate to his wife, in trust for the "use and support of herself, and the

[1] 1 Jarman on Wills, 135 (and Randolph & T.'s Am. note, vol. 1, p. 294, note 17).

benefit, education and support" of his infant son until he should arrive at the age of twenty-one years, when he bequeathed one-half of his personal property absolutely to his wife; but she dying, he struck out his own signature, and the names of the subscribing witnesses, and made a memorandum at the bottom of the will, assigning as a reason for what he had done, that his wife's death had rendered it necessary to make another will. If that was not a revocation, it would be found difficult to revoke a will by cancelling. In Burtenshaw vs. Gilbert, 1 Cowp. 49, which was cited in argument, there were two wills, and after the death of the party, the second will, with a duplicate of the first, which he had kept himself, were found together among his papers both cancelled; and it was proved that he had sent for an attorney to prepare another will, but lost his senses before it could be done. It was not doubted that the second will was revoked. The only question raised, was whether the revocation of the second will did not set up the uncancelled duplicate of the first, and it was determined that it did not. That case surely cannot be called in aid of this will.

Decree affirmed.

WILL NOT FOUND.—PRESUMPTION.

The general rule is, that if it is shown that a will was in existence in testator's lifetime, and in his custody, and that it could not be found at his death, it will be presumed that he destroyed it *animo revocandi*.[1] But this presumption may be rebutted,[2] as illustrated in the following cases.

WILL NOT FOUND.—INSANE TESTATOR.—NO PRESUMPTION.

Sprigge v. Sprigge.

ENGLISH COURT OF PROBATE, 1868.

(L. R. 1 P. & D. 608.)

The testator, Oliver Sprigge, was a surgeon at Peterborough. On the 15th of September, 1858, immediately after his marriage, he duly executed a will in favour of his wife, and of any children who might be born of the marriage. In 1863 he became of un-

[1] Betts v. Jackson, 6 Wend. 173; Idley v. Bowen, 11 Wend. 227; Lillie v. Lillie, 3 Hagg. 184.

[2] Colvin v. Fraser, 2 Hagg. 266 (325); Welch v. Phillips, 1 Moo. P. C. 299.

sound mind, and in November, 1865, he was confined in a lunatic asylum, where he remained until his death on the 3d of December, 1867.

The plaintiff, as executrix, propounded the contents of the will as contained in a copy. It was proved that the will was the same as the copy propounded; that after the execution it was in the custody of the deceased, and it remained in his custody; that after his death search was made for it, and it could not be found. There was no evidence of destruction of the will, and the latest date at which it was proved to have been in existence was about two months after its execution, when it was seen in the deceased's desk. The defendants, who were the children of the marriage, and the only next of kin of the deceased, appeared by their guardian and pleaded a revocation. The cause came on for hearing before the court, without a jury.

(Nov. 17, 1868.) Sir *J. P. Wilde.*—The question in this case is whether, under the circumstances that happened, the court ought or ought not to consider that the will had been revoked—the fact being that it remained in the custody of the testator from the time when it was made, and that upon his death it was not to be found. The presumption of law in this state of things, under ordinary circumstances, is, that it was destroyed *animo revocandi.* It appeared in this case that the testator, during a considerable portion of the time that elapsed between the making of the will and his death, was insane. The question, therefore, arises, whether the court ought to apply the ordinary presumption of law to such a case. The case of Harris v. Berrall [1] was cited, and I am of opinion that it is an authority directly in point. The will in that case had been mutilated, not destroyed, and the question was, whether it had been mutilated *animo cancellandi;* the deceased having been insane during a portion of the time between the execution and her death. Sir C. Cresswell said: [2] "If there had been no evidence to fix one time or another for its mutilation, I still think that it would have been entitled to probate. By 1 Vict., c. 26, every will is required to be executed as therein prescribed. If it is once proved that a will has been duly executed, I hold that it is entitled to probate, unless it is also shewn that it has been re-

[1] 1 Sw. & Tr. 153.

[2] 1 Sw. & Tr. at pp. 154, 155.

voked by one of the several modes pointed out by the statute; and I am of opinion that the burden of shewing that it has been so revoked lies upon the party who sets up the revocation. One of the modes of revocation pointed out by the statute is tearing with an intention to revoke; but an insane person cannot be said to have any intention. The will in this case was in the custody of the deceased at the time she was of unsound as well as of sound mind. Shortly before her death it was discovered to have been torn by her. The burden of shewing that it was not done after she became insane, but at a time when she was of sound mind, is cast upon the plaintiff who sets up the revocation of the instrument." I entirely agree with the opinion of Sir C. Cresswell, and the principle which he lays down as to a case of mutilation, applies equally to a case of destruction. The short proposition is, that the burden of shewing that the revocation was done not after the testator became insane, but when he was of sound mind, is cast on those who set up the revocation. In this case there was no evidence to shew when it was done. Therefore, those who sought to set up a revocation failed in establishing the facts on which the presumption of revocation would rest. The paper propounded by the plaintiff is entitled to probate. The costs of all parties will be allowed out of the estate.

WILL NOT FOUND.—WHEN NO PRESUMPTION.

John Schultz and others v. William Schultz and others.

NEW YORK COURT OF APPEALS, 1866.

(33 N. Y. 653.)

Davies, Ch. J.—This action is instituted to establish the will of Frederick Schultz, deceased, on the ground that the same has been lost or destroyed by accident or design. The action was tried by the court without a jury, and the following facts found: That Frederick Schultz, on the 23d day of October, 1863, duly made and executed his last will and testament in writing, in due form of law, as a will of real and personal estate, and the same was duly attested; by the terms of which he did dispose of all his real and personal estate, and after the execution thereof, he delivered the same to Frederick B. Schultz, as custodian, to be by him retained; that Frederick B. Schultz took such will to hold

and preserve, and carried the same to his residence for that purpose; that the provisions of that will are clearly and distinctly proved by the testimony of two credible witnesses, and are as set forth in the testimony in the record; that on the 20th day of September, 1865, the said Frederick Schultz departed this life, without having made any other will, and leaving him surviving his widow, Elizabeth Schultz, and his children, John F. Schultz, William Schultz, and Eliza J. Teal, his only heirs-at-law and next of kin. And the court found, as matter of law, that the foregoing evidence was not sufficient to show that the said last will and testament was in existence at the time of the decease of the said Frederick Schultz, or that the same was fraudulently destroyed in the lifetime of the testator, and decided that the complaint should be dismissed, and rendered judgment for the defendants, and which judgment, on appeal, was affirmed at the General Term. The plaintiffs now appeal to this court.

The provisions of the Revised Statutes of this State, applicable to the case now under consideration, are as follows:

Sec. 37. "No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction shall be proved by, at least, two witnesses." Section 86 enacts: "Whenever any will of real or personal estate shall be lost or destroyed by accident or design, the Supreme Court shall have power to take proof of the execution and validity of such will, and to establish the same as in the case of lost deeds." Section 90 declares, that "no will of any testator who shall die after this chapter shall take effect as a law, shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator; or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions shall be

clearly and distinctly proved by, at least, two credible witnesses, a correct copy or draft being deemed equivalent to one witness." (3 R. S., 5th ed., p. 144, etc.)

The existence of the will of this testator, its due execution, and its provisions were clearly and distinctly proven in the manner required by law. If the will had remained in the custody of the testator, or it had appeared that, after its execution, he had had access to it, the presumption of law would be, from the fact that it could not be found after his decease, that the same had been destroyed by him, *animo revocandi*. (Jackson v. Betts, 6 Wend. 173; Idley v. Brown [Idley v. Bowen, 11 Wend.] 227; Knapp v. Knapp, 10 N. Y. 276.) But that presumption is entirely overcome and rebutted, when it appears, as it did in the present case, that, upon the execution of the will, it was deposited by the testator with a custodian, and that the testator did not thereafter have it in his possession or have access to it. It is undeniable, therefore, that the testator himself did not burn, tear, cancel, obliterate, or destroy the will. It does not appear, or is it pretended, that it was done by another person in his presence, by his direction and consent. At any rate, such injury or destruction has not been proven by two witnesses. It follows clearly, therefore, that the will of this testator has never been legally revoked or canceled.

That it has been lost or destroyed by accident or design is conceded, and the Supreme Court had, therefore, jurisdiction to take proof of the execution and validity of the will, and to establish the same. But the learned judges of the Supreme Court have supposed that it could not be established unless there was affirmative proof that the will was in existence at the time of the testator's death, or that it was shown that it was fraudulently destroyed in the testator's lifetime. Both or either of these propositions may be established, as well by circumstantial as positive evidence:

1. As to the existence of the will at the time of the testator's death, we have the conceded fact of the execution of the will, and of the deposit of the same with a custodian for safe keeping. The custodian testifies that, after it was delivered to him, at the time of its execution, he never parted with its possession, but locked it in a trunk, and supposed it was there at the time of the testator's death. Upon search made for it after his death, it could not be found. There is not a scintilla of evidence or a circumstance to

show that the testator ever had possession of the will after its execution and delivery to the custodian. It follows, therefore, as a legal conclusion, that the will was in existence at the time of his death (if not then fraudulently destroyed or lost), in which event, it being now lost or destroyed, either by accident or design, it should be established as a valid will.

2. If the will was not in existence at the time of the testator's death, then it follows equally clear that it must have been fraudulently destroyed in his lifetime or lost. The fraud mentioned and referred to in this connection is a fraud upon the testator, by the destruction of his will, so that he should die intestate, when he intended and meant to have disposed of his estate by will and never evinced any change of that intent. It is undeniable, from the facts in the record, that either this will was in existence at the time of the death of this testator, or that it had been destroyed in his lifetime, without his knowledge, consent or procurement, or accidentally lost. If so destroyed, it was done fraudulently as to him, and, in judgment of law, the legal results are the same precisely as if it had continued in existence up to the time of his death. In either contingency, it was his last will and testament, and its loss or destruction, either by accident or design, being proven, it is the duty of the court to establish it as the will of this testator.

The judgment of the Supreme Court should be reversed and a new trial ordered, costs to abide the event.

Judgment reversed and new trial ordered.

WILL NOT FOUND.—PRESUMPTION.—INTERNAL AND EXTRINSIC EVIDENCE.

Patten v. Poulton and Others.

ENGLISH COURT OF PROBATE, 1858.

(1 Sw. & Tr. 55.)

SIR *C. Cresswell.*—This is a cause of propounding the will of Julia Clarenza, deceased, promoted by James Patten, the executor therein named, against R. L. Poulton, her eldest brother, and others, next of kin. Several witnesses were examined on Patten's allegation; the next of kin did not bring in any allegation or administer any interrogatories. The following facts are proved:

Julia Clarenza, formerly Poulton, in 1806 married John Pechè, and by him had three children, two sons and a daughter; she then discovered that before the marriage Pechè was married to another woman, who was still living, and thereupon immediately separated from him, and never cohabited with him again. She afterwards married Count Clarenza, who died in 1822, and by him had no issue. John Pechè died in 1823, having made a will in favour of his three children above mentioned, his property being sworn under £3,000. Julia Clarenza was always devotedly attached to her children, who grew up under her care. The daughter married an Austrian, one son entered the Austrian army, and the other settled at the Cape, and she maintained a correspondence with them during the whole of her life, always manifesting the strongest affection for them, and anxiety for their prosperity. After Count Clarenza's death she lived at Blackheath, in Kent, and when there, often spoke to a lady with whom she was intimate, of her anxiety about them, and of her intention to settle her affairs, so that they might enjoy the small property of which she had to dispose. In 1837 she was about to remove to Torquay, and then gave instructions in her own handwriting to Mr. Patten, a solicitor, for the preparation of her will. He prepared one according to those instructions, and, at her request, consented to act as executor. The will was executed on the 10th of October, 1857, and at the same time the attestation clause and the names of the attesting witnesses were copied on to the draft, which Mr. Patten retained, the will being given to the deceased. She afterwards told a Mrs. Kipps, an intimate friend resident at Blackheath, that she had settled her affairs; and in 1844, writing to the same lady, said, "My mind seems now at ease, that the £600 is now secure in the bank for my children in case of sudden death." In October, 1837, the deceased removed to Torquay, and remained there for some time occupying part of the house in which her brother R. L. Poulton resided. She afterwards removed to Dawlish, and there occupied part of a small cottage till her death, which happened in September, 1846. Her brother thereupon went to Dawlish and searched for a will without success, when so doing he burnt some papers, which appeared to him unimportant, and it was not imputed that he had intentionally destroyed a will. The delay that has occurred in propounding the will having been accounted for, I make no obser-

vation respecting it. The case, then, stands thus: the executor has proved the due execution of a will, and that the original cannot be found, and he has given satisfactory secondary evidence of the contents. But, on the other hand, it is said that, as the will was in the keeping of the deceased, and at her death could not be found, it must be presumed that she destroyed it *animo revocandi*. This has sometimes been called a presumption of law; but I think that Sir J. Nicholl, in Colvin v. Fraser (2 Hagg. 325), and Parke, B., in Welsh v. Phillips (1 Moo. T. C. C. 302), more correctly designate it a presumption of fact, and there can be no doubt, that evidence of a will being left in the keeping of the party who made it, and that it cannot be found at his death, is sufficient, in the absence of circumstances tending to a contrary conclusion, to warrant an opinion that the maker of the will destroyed it. But it is a presumption that prevails only in the absence of circumstances to rebut it, and is, therefore, commonly called a *primâ facie* presumption. It may be fortified or it may be rebutted by many circumstances. Those commonly relied on are declarations either of good will towards the parties benefited by the will, and of an adherence to the will as made, or, on the contrary, of dissatisfaction and change of mind respecting them. In Saunders v. Saunders (6 No. Cas. 522) Sir H. Jenner Fust said, "The strongest proof of adherence to the will, and of the improbability of its destruction, arises from the contents of the will itself." In the present case I find no extraneous circumstances to fortify and support the *primâ facie* presumption; the lady changed her residence twice after the will was made, and she does not appear to have had any place for the deposit and safe custody of papers of importance; the probability of the will being lost by accident is not therefore excluded. Again, her brother destroyed some papers, the particular nature of which is not ascertained. It is not suggested that he willfully destroyed a will, nor is it probable that he could destroy the will in question, which would be of considerable bulk, without some examination; but the possibility of its being so destroyed is not excluded. On the other hand there are many circumstances tending to negative the presumption: the constant undeviating affection manifested by the deceased for her children,—that the will was made under the influence of that feeling as expressed at the time and afterwards,—that she never expressed a desire to benefit by

her will any other person, and above all, the fact that she perfectly well knew that her children were illegitimate (although not by any fault of hers), and that consequently, if she died intestate, they would receive no part of her property, but the whole would be divided amongst others. Here then, as in Saunders v. Saunders, it may be said, that the contents of the will itself show the improbability of its destruction. These circumstances combined render it so improbable that the deceased would willfully destroy a will made in favour of her children, that I cannot, from the mere circumstances of its not being found, presume that she did so. The will then having been duly executed, the contents of it having been duly proved by secondary evidence, and it not being established that the deceased revoked that will, the court must give effect to it by pronouncing for its force and validity, and by decreeing probate of the draft.

WILL NOT FOUND.—PRESUMPTION REBUTTED.

Foster's Appeal.

PENNSYLVANIA SUPREME COURT, 1878.

(87 Penn. St. 67.)

Before *Agnew*, C. J., *Sharswood*, *Mercur*, *Gordon*, *Paxson*, *Woodward*, and *Trunkey*, JJ.

Appeal from the decree of the Orphans' Court of Wayne County. The facts are sufficiently stated in the opinion.

Agnew, C. J.—That Isaac P. Foster made and executed in due form of law a will in writing on or about the 5th of June, 1875, is an indisputable fact. That the contents of this will are clearly and fully proved, both by testimony and by written memoranda in the testator's own handwriting, is equally plain, and no question arises as to the number of witnesses, the contents being proved by two, as well as by the memoranda furnished by the testator himself. The will not being found after the testator's death and diligent search, two material questions arise upon the assignment of errors:

1. Whether the presumption of revocation by the testator himself is rebutted by the evidence.

2. Whether the contents can be proved by parol evidence.

There is ample evidence to rebut the presumption of a revoca-

tion by the testator. Many facts contribute to this result, among which these leading circumstances appear. Isaac P. Foster was never without a will for the last fifteen years of his life, having had seven written under the supervision of counsel and made necessary by the nature and amount of his estate, the number of his children, and advancements made to some, and those matters were often dwelt upon by himself. He, himself, regarded his will of 1875 as existing until and while lying on his death-bed, when too feeble to destroy it without assistance. Up to this time he made efforts to procure a codicil to alter the will in a certain aspect, made necessary by the failure in the payment of interest on certain bonds, but being prevented by the extremity of his last illness, died under a belief that he had arranged with his executors to pay these legatees money instead of the bonds. These and corroborating circumstances show that the testator had no thought of a revocation.

That the presumption of a personal revocation can be thus rebutted is shown by the authorities cited by the appellees. The presumption of revocation arises from the fact that the will was known to be in the possession of the testator himself, and that it cannot be found after his death. It is, therefore, a natural presumption merely, because it cannot be supposed the testator would part with it, unless he intended to put it out of the way, and because it is out of the way and cannot be accounted for, the presumption that he intended to revoke it arises. Like other natural presumptions drawn from evidence, and not declared *de jure*, for some legal end, it must give way to stronger evidence of the continued existence of the will, and the testator's reliance upon it as the disposition he had made of his property.

The will then being in existence at the death of the testator unrevoked by him, its loss or accidental destruction differs not from the loss or destruction of any other solemn instrument, such as a deed, a note or bond, or a record. The contents, therefore, may be proved in like manner, as shown by the authorities cited. It is a postulate of the question that the testator left behind him at death, a last will in writing, legally executed and published, and unrevoked by any act or direction of his. That the law will not tolerate any making of a will for him by other means than his own act in writing duly executed, is clear. But such a will having a

legal existence, yet accidentally lost or destroyed, the establishment of its contents is not the making of a new will, but a restoration merely of that which the testator himself made and left behind him to govern his estate. There is no greater sanctity, in this respect, than the restoration by parol evidence of other instruments equally solemn and having an equal effect in the disposition of property. The law simply comes in aid of his own legally performed act, to prevent his intentions from being frustrated or defrauded. The authorities upon the republication of wills, made before the passage of the act of 1833, have a bearing and may therefore be cited—some not appearing in the paper-books. Havard v. Davis, 2 Binn. 406; Jones v. Hartley, 2 Whart. 103, citing many cases; Campbell v. Jamison, 8 Barr. 498; Jack v. Shoenberger, 10 Harris 416; Fransen's Will, 2 Casey 203. We cannot perceive that the learned judge erred in ruling either point.

(Here follows a discussion of a question of practice.)

Decree of the Orphans' Court affirmed.

[Also Weeks v. McBeth, 14 Ala. 474; Minkler v. Minkler, 14 Vt. 125.]

LOST WILL.—WHERE LOSS EXPLAINED.

In the Goods of Gardner, on Motion.

ENGLISH COURT OF PROBATE, 1858.

(1 Sw. & Tr. 109.)

The deceased in this case, a captain in the 38th Bengal Light Infantry, made his will at Cawnpore, in the East Indies, in May or June, 1855. The deceased, his wife, and their two only children, were in Delhi in May, 1857, when the mutiny broke out; they escaped from that city, leaving all their property behind them, among which was the deceased's writing-case, in which his will was deposited. Captain Gardner died at Kussowlee on the 28th of June, 1857, leaving his widow and two only children, the only persons entitled in distribution in case of an intestacy.

The joint affidavit of Mrs. Gardner and of Lieut. Hawes, one of the attesting witnesses, established the due execution of the will in 1855, and its contents, namely, leaving all his property to his wife, and making her sole executrix. Mrs. Gardner spoke of having read it over, and to having seen it in her husband's desk as lately

as February, 1857, and to her assurance that it had not been revoked or destroyed by her husband prior to their leaving Delhi, and that since the recapture of Delhi nothing had been heard of the will. The property amounted to about £1,000.

Dr. *Phillimore*, Q. C., moved the court "to decree probate of the will as contained in the affidavit to be granted to the widow, the sole executrix named therein, limited until the original will or a more authentic copy thereof shall be brought into and left in the registry of the court." He submitted there was before the court sufficient proof of the execution and contents of the original will, and cited Trevelyan v. Trevelyan, 1 Phill. 153 [given *ante*].

Sir *C. Cresswell:* The case of Brown v. Brown, lately decided in the Court of Queen's Bench and on which I have already acted,[1] went beyond the present case. There parol evidence was held sufficient to prove the contents of a will, and thereby revoke a will of earlier date, which was in existence at the testator's death. I grant the motion.

WILL FOUND MUTILATED.—PRESUMPTION.

Bennett, Ex'r, etc. vs. Sherrod.

North Carolina Supreme Court, 1843.

(3 Ired. L. 303.)

Appeal from the Superior Court of Law of Martin County, at Spring Term, 1843, his Honor Judge Manly presiding.

This was an issue to try whether a certain instrument of writing, propounded by the plaintiff, was the last will and testament of John Sherrof, deceased.

After the evidence was in, the counsel for the defendant asked the court to instruct the jury, if they believed the instrument of writing was found in the possession of the deceased in a mutilated state, that there was a presumption of law that the mutilation was the act of the deceased, subject to be rebutted by the parties propounding the will. The court declined giving this instruction.

There was a verdict establishing the will, and from the judgment thereon the defendant appealed.

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[1] In the Goods of William Brown, 1 Sw. & Tr. 32. 8 El. & Bl. 876.

Daniel, J.—The authorities cited by the counsel for the appellant shew, that, where a will has been duly executed and left with the testator, if it be mutilated in his lifetime while in his possession, or upon his death if it be found among his repositories, cancelled or defaced, in such cases, in the absence of other proof, the testator is presumed to have done the act; and the law further presumes, that he did it *animo revocandi*. And if the repository of the will was at the same time accessible to the testator and another person and the mutilation was done in the lifetime of the testator, the law would presume it was done by the testator. He had a right to do it, and a fraud will not be presumed in the other person. All the rules above stated, we think, may be taken for good law, but it seems to us that they are not apposite to the case now before us. There is no evidence in the cause, that the will was found mutilated in the lifetime of the testator, or found mutilated among his papers immediately on his death. It was on the day after his death that application was made to his widow for the will. She, who is the party defendant in this issue, acknowledged that the will or paper was there, but refused then to deliver it. She then locked the drawer, where the paper was, and put the key in her bosom. There is no evidence that the will was, at that time, mutilated, for her declarations then made do not prove that fact, but rather import the contrary. On the second day after the testator's death, and after the widow had every opportunity of mutilating the paper, with which she was dissatisfied, the will was found by the plaintiff in the drawer in its present state. It seems to us, so far from its being the duty of the judge to charge the jury, that the law presumed this mutilation to have been the act of the testator, that it would have been erroneous if he had so charged. We are of opinion that the judgment must be affirmed.

Judgment affirmed.

Per Curiam.

[A principle similar to that here applied, is also enforced in cases of wills not found, as already stated, where it is not until sometime subsequent to testator's death that search is made, and in the meantime a person interested to destroy the will has been in position to do so if it did exist. This is very well illustrated in Finch v. Finch, L. R. 1 P. & D. 371.

For the presumption, where will is found mutilated among tes-

tator's papers, Christmas v. Whinyates, 3 Sw. & Tr. 81; Stephens v. Taprell, 2 Curt. 458 (463); *In re* Philp's Will, 46 N. Y. State Rep. 356 (the latter case, it is to be observed, is recent, and has only been passed on by the Surrogate and the General Term).]

MUTILATED WILL AMONG OLD PAPERS.

Lawyer v. Smith.

MICHIGAN SUPREME COURT, 1860.

(8 Mich. 411.)

Error to Washtenaw Circuit.

Application for probate of paper purporting to be the last will of Gertrude or Gitty Fletcher. Granted by Probate Court; sustained at Circuit by verdict of jury. The contestants brought error.

Manning, J. (After passing on certain charges of error.)

But the judge erred, we think, in refusing to receive evidence of the declarations of the testatrix that she had destroyed her will, and in not admitting a letter of hers, stating her will was destroyed. Such evidence is not admissible as proof in itself of a revocation, for the statute provides, "no will, nor any part thereof, shall be revoked unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction"; "or by some other will, codicil or other writing executed in the manner provided for the execution of a will":—Comp. L., sec. 2833. The first we hear of the will after its execution in 1824, is the finding of it by Feeck in 1849, "in a barrel among a lot of waste paper, newspapers, pamphlets, and some old letters." He says, "it was separated at the top, and was in a number of pieces, and the different pieces were scattered loose among the papers in the barrel." It consisted of a number of half sheets of paper, some of which were separated in two pieces, and a piece was torn out of the top. He gathered them up, matched them, and fastened them at the top, and kept them in his possession five and a half years. A will found as this was, in a barrel among old letters and other papers of no account, and in the mutilated condition stated, needs some explanation of these circumstances to admit it to probate. The piece torn out at the top and the separation of the half sheets can-

not be accounted for by the age of the instrument. They are evidence of violence, or an intentional injury to the instrument; but whether done by the testatrix or some other person; and if done by her, whether accidentally, or intentionally and for the purpose of revoking her will, were questions of fact to be determined by the jury. To aid them in arriving at a correct conclusion on these points, and not as separate and independent evidence of a revocation, we think the declarations of the testatrix should have been permitted to go to the jury, for what they were worth, under all the circumstances. See opinion of Chancellor Walworth, in Betts v. Jackson, 6 Wend. 173.

(Here follows a consideration of the competency of certain witnesses.)

Judgment reversed and a new trial granted.

The other Justices concurred.

WHETHER REVOCATION REVIVES A PREVIOUS WILL.

Pickens, Adm'r v. Davis.

MASSACHUSETTS SUPREME JUDICIAL COURT, 1883.

(134 Mass. 252.)

Appeal from decree of Probate Court, admitting will of Mary Davis.

C. Allen, J.—The two questions in this case are, first, whether the cancellation of a will, which was duly executed, and which contained a clause expressly revoking former wills, has the effect, as matter of law, to revive a former will which has not been destroyed, or whether in each instance it is to be regarded as a question of intention, to be collected from all the circumstances of the case; and secondly, if it is to be regarded as a question of intention, whether subsequent oral declarations of the testator are admissible in evidence for the purpose of showing what his intention was. These are open questions in this Commonwealth. In Reid v. Borland, 14 Mass. 208, the second will was invalid, for want of due attestation. In Laughton v. Atkins, 1 Pick. 535, the second will was adjudged to be null and void, as having been procured through undue influence and fraud; and the whole decision went upon the ground that it was never valid, and could not be.

The first of these questions has been much discussed, both in

England and America; and it has been often said that the courts of common law and the ecclesiastical courts in England are at variance upon it. See 1 Wms. on Executors (5th Am. ed.) 154–156, where the authorities are cited. [1 Jarman on Wills, 145; Randolph & T.'s Amer. note, Id., vol. 3, p. 796, note 23.] The doctrine of the ecclesiastical courts was thus stated in 1824, in Usticke v. Bawden, 2 Add. Ecc. 116, 125: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled, upon the cancellation of a later, revocatory will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, solely according to facts and circumstances." See also Moore v. Moore, 1 Phillim. 406; Wilson v. Wilson, 3 Phillim. 543, 554; Hooton v. Head, 3 Phillim. 26; Kirkcudbright v. Kirkcudbright, 1 Hagg. Ecc. 325; Welch v. Phillips, 1 Moore P. C. 299. In Powell on Dev. (ed. of 1827) 527, 528, a distinction is taken between the effect of the cancellation of a second will which contains no express clause revoking former wills, and of a will which contains such a clause; and in respect to the latter it is said that, "if a prior will be made, and then a subsequent one expressly revoking the former, in such case, although the first will be left entire, and the second will afterwards cancelled, yet the better opinion seems to be, that the former is not thereby set up again." Jarman's note questions the soundness of the above doctrine (p. 529, *n.*). While this apparent discrepancy in the respective courts remained not fully reconciled, in 1837, the English Statute of Wills was passed, St. 7 Will. IV. & 1 Vict. c. 26, sec. 22 of which provided that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Since the enactment of this statute, the decisions in all the courts have been uniform, that after the execution of a subsequent will which contained an express revocation, or which by reason of inconsistent provisions amounted to an implied revocation of a former will, such former will would not be revived by the cancellation or destruction of the later one. Major v. Williams, 3 Curt. Ecc. 432; James v. Cohen, 3 Curt. Ecc. 770, 782; Brown v. Brown, 8 El. & Bl. 876; Dickinson v. Swatman, 30 L. J. (N. S.) P. & M. 84; Wood v. Wood,

L. R. 1 P. & D. 309. In order to have the effect of revocation, it must of course be made to appear that the later will contained a revocatory clause, or provisions which were inconsistent with the former will; and the mere fact of the execution of a subsequent will, without evidence of its contents, has been considered insufficient to amount to a revocation. Cutto v. Gilbert, 9 Moore P. C. 131. See also Nelson v. McGiffert, 3 Barb. Ch. 158.

In the United States, there is a like discrepancy in the decisions in different States, though the clear preponderance appears to be in favor of a doctrine substantially like that established in the ecclesiastical courts. This rule was established in Connecticut, in 1821, in James v. Marvin, 3 Conn. 576, where it was held that the revocatory clause in the second will, *proprio vigore*, operated instantaneously to effect a revocation, and that the destruction of the second will did not set up the former one; and the like rule was declared to exist in New York, by the Supreme Court of that State, in 1857, in Simmons v. Simmons, 26 Barb. 68. The question was greatly considered in Maryland, in 1863, in Colvin v. Warford, 20 Md. 357, 391, and the court declared that "a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it." The court further held that the cancellation of a revoking will, *primâ facie*, is evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. In Harwell v. Lively, 30 Ga. 315, in 1860, a similar rule was laid down, and maintained with great force of reasoning. The opinion of the court concludes with the following pertinent suggestion: "It must be conceded there is much law adverse to the doctrine. . . . . Calculated as it is to subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late act, is it not the dictate of wisdom to begin in this State where they have ended in England? We think so." See also Barksdale v. Hopkins, 23 Ga. 332. The courts of Mississippi, in 1836, and of Michigan, in 1881, adopted the same rule. Bohanon v. Walcot, 1 How. (Miss.) 336; Scott v. Fink, 45

Mich. 241. It is to be observed, that some of the foregoing decisions are put expressly on the ground that the later will contained an express clause of revocation. 45 Mich. 246; 20 Md. 392. An examination of the cases decided in Pennsylvania leads us to infer that a similar rule would probably have been adopted in that State, if the question had been directly presented. Lawson v. Morrison, 2 Dall. 286, 290; Boudinot v. Bradford, 2 Yeates 170; s. c. 2 Dall. 266; Flintham v. Bradford, 10 Penn. St. 82, 85, 92.

On the other hand, in Taylor v. Taylor, 2 Nott & McC. 482, in 1820, it was held in South Carolina that the earlier will revives upon the cancellation of the later one; and the same rule prevails in New Jersey, as is shown by Randall v. Beatty, 4 Stew. (N. J.) 643, and cases there cited.

In various States of the Union, statutes have been enacted substantially to the same effect as the English statute above cited, showing that wherever, so far as our observation has extended, the subject has been dealt with by legislation, it has been thought wiser and better to provide that an earlier will shall not be revived by the cancellation of a later one. There are, or have been, such statutes in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas, and Virginia, and probably in other States. Concerning these statutes of New York, it is said in 4 Kent Com. 532, that they "have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds."

On the whole, the question being an open one in this State, a majority of the court has come to the conclusion that the destruction of the second will in the present case would not have the effect to revive the first, in the absence of evidence to show that such was the intention of the testator. The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his prop-

erty, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators, in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to have existed at the time of cancelling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. Under the statute of England, and of Virginia, and perhaps of other States, such revival cannot be proved in this manner. Major v. Williams, and Dickinson v. Swatman, above cited. Rudisill v. Rodes. 29 Grat. 147. But this results from the express provision of the statute.

In the present case there was no evidence tending to show that the testatrix intended to revive the first will; unless the bare fact that the first will had not been destroyed amounted to such evidence. Under the circumstances stated in the report, little weight should be given to that fact. The will was not in the custody of the testatrix, and the evidence tended strongly to show that she supposed it to have been destroyed.

The question, therefore, is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in evidence for the purpose of showing that she did not intend, by her cancellation of the second will, to revive the first; because, in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive, or not to revive, the earlier will. Whether it had the one effect, or the other, de-

pended upon what was in the mind of the testatrix. It would in many instances be more satisfactory to have some decisive declaration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true that it may not be proper to prove the direct act of cancellation, destruction, or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous, or subsequent, may be proved in evidence.

In the great case of Sugden v. St. Leonards, 1 P. D. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in the argument, at one stage of the discussion, that such subsequent declarations would be admissible to rebut a presumption of revocation of the will; but, this being afterwards questioned, it was declared and held, on the greatest consideration, not only that these, but also that declarations as to the contents of the will, were admissible. See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241. The case of Keen v. Keen, L. R. 3 P. & D. 105, is to the same effect. See also Gould v. Lakes, 6 P. D. 1; Doe v. Allen, 12 A. & A. 451; Usticke v. Bawden, 2 Add. Ecc. 123; Welch v. Phillips, 1 Moore P. C. 299; Whitely v. King, 10 Jur. (N. S.) 1079; Re Johnson's Will, 40 Conn. 587; Lawyer v. Smith, 8 Mich. 411; Patterson v. Hickey, 32 Ga. 156; 1 Jarm. Wills (5th Am. ed. by Bigelow), 130, 133, 134, 142, and notes. The question was also discussed, and many cases were cited, in Collagan v. Burns, 57 Maine 449, but the court was equally divided in opinion. Many, though not all, of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold merely

that the direct fact of revocation cannot be proved by such declarations.

The result is, that, in the opinion of a majority of the court, the will should be disallowed, and the decree of the Probate Court *Reversed.*

REPUBLICATION.

Thus far we nave considered the subjects of testamentary capacity and the execution and revocation of wills. There is a further topic which, while in a sense distinct, is closely allied to that of execution, namely, that of republication and revival of wills. The occasion for republishing and reviving wills may arise in various ways. A will, for instance, may have been duly executed to begin with, and then have been revoked, either expressly or by implication. Here, unless it is in some way revived by some subsequent act, it of course counts for nothing. So the original will may, in the first instance, have been improperly executed. And in any case where, as facts now stand, a will would not take effect if left as it is, it is necessary, in order to establish it anew, that it should be revived and republished. We have already seen, in the Chapter on Execution, that it is not necessary in some jurisdictions that testator, in order to duly execute his will, should "publish" it, in the sense of declaring it to be his will. And so also in such jurisdictions he may revive it by *re-execution*, or by executing a new instrument, duly referring to it, without a re-declaration. The term "Republication," therefore, is not always accurate; but it is commonly used in the sense of revival, by any legal method, and in that sense is here employed.

In all cases, it is always sufficient to re-execute the will anew, just as if it had never been executed at all. But there is still another method of reviving it which is of great importance, namely, by due reference to it in a codicil or subsequent will which is in itself duly executed. The execution of the later instrument also relates back to and covers the former will and revives it.[1] Nor is it necessary that the later instrument should

[1] Estate of Masters, 1 Civ. Pr. R. (N. Y.) 459; Van Cortlandt v. Kip, 1 Hill (N. Y.) 590; s. c. 7 Hill 346; Van Alstyne v. Van Alstyne, 28 N. Y. 375; 1 Williams on Executors, 211; 1 Jarman on Wills (Randolph & T.'s Ed.), Ch. VI., section iv., and Ch. VIII.; 11 Moore P. C. 426; Brown v. Clark, 77 N. Y. 369; Murfield's Estate (Ia.), 38 N. W. Rep. 170; McCurdy v. Weall, 7 Atl. Rep. 566.

set forth in express terms the testator's intention to republish the former. Any reference which makes such an intention obvious, will suffice. It follows as a corollary from these propositions, that if a former will is thus referred to in a manner sufficient to revive it, if in need of reviving, it is sufficient, in proving both instruments, to prove the due execution of the later one only, even though in fact the former was in fact duly executed. For, if the due execution of the later suffices for both, it is immaterial whether the earlier was duly executed or not.[1]

Illustrations.

(*a*). A codicil referred merely to "my will." Held, citing many authorities, that this republished the will itself, and that on proceedings for probate of both instruments, it was necessary to prove the codicil only.[2]

(*b*). A codicil merely referred to the will by date. This sufficed to republish the will.[3]

(*c*). A second codicil referred to the first codicil merely by being itself designated as "another codicil." It thereby republished the first codicil.[4]

REPUBLICATION ONLY BY NEW EXECUTION.

Barker vs. Bell et al.

ALABAMA SUPREME COURT, 1871.

(46 Ala. 216.)

Appeal from Probate Court.

Peters, J.—This is a proceeding on the contest of a will before its probate, under our statute. There was a jury trial in the court below, and a verdict in favor of the will offered for probate, and a judgment of the court allowing the probate of the instrument offered, according to the verdict.

The evidence tends to show that there were two wills made by the decedent, Wm. M. Bell. The one was made in January,

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[1] See Index, "Incorporation."

[2] Matter of Nesbit, 5 Dem. 287.

[3] Payne v. Payne, 18 Cal. 291. See Storm's Will, 8 Redf. (N. Y.) 827.

[4] Ingoldby v. Ingoldby, 4 No. Cas. 498.

1868, and the other in May or June, 1868. This latter will was not produced on the trial, and there was no written evidence to show that it had been revoked or canceled. The testamentary paper of January, 1868, was the will offered for probate, and the one that was established by the decree of the court. It disposes of the real and personal estate of the testator. The issue covered all the ground of contest that could be made on such an instrument. The evidence tends to establish the allegation that it had been regularly made and attested, and declared to be the will of the party making it, to wit, said Wm. M. Bell, as required by the Code. But after the death of Bell, the alleged testator, it was found in possession of his widow, with his name torn off, and the names of the attesting witnesses, of whom there were three, remained legible. There was proof going strongly to show that these obliterations had been made by the testator himself, while the will was in his possession; that he had handed it to his wife, or she had gotten it from his pocket, and that it was so obliterated when she obtained it, and that he had then declared that the obliteration was his work, and he intended it as a cancellation of the will. There was no testimony that this will had been canceled or torn by any other person. There was proof, also, that the testator had spoken of this paper, after the making and publication of the subsequent will of May or June, 1868, as "his will," and declaring that he had destroyed the will of May or June, 1868.[1] This was in April, 1870, just before decedent's death.

On this evidence the court gave several charges to the jury, which were excepted to by the contestants, and refused to give several others which were asked by the contestants, and the refusals were each made the basis of an exception. It is not necessary to notice the exceptions arising on the charges given, as like questions arise on the charges refused. One of these charges is recited in the record in the following terms:

"The contestants asked the court to charge the jury in writing, that the testator could not republish the will propounded by parol declarations alone."

This charge should have been given. To refuse it was error.

The Code is intended to contain all the statute law of this State

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[1] See Index, "Declarations."

of "a public nature, designed to operate upon all the people of the State up to the date of its adoption, unless otherwise directed in the Code,"—Code, sec. 10. This law is not merely cumulative of the common law, and made to perfect the deficiencies of that system, but it is designed to create a new and independent system, applicable to our own institutions and government. Rev. Code, sec. 10. In such case, where a statute disposes of the whole subject of legislation, it is the only law. Otherwise, we shall have two systems, where one was intended to operate, and the statute becomes the law only so far as a party may choose to follow it. Besides, the mere fact that a statute is made, shows that so far as it goes, the legislature intended to displace the old rule by a new one. On some questions the common law conflicts more or less with constitutional law, and is necessarily displaced and repealed by it. And on others it has, by lapse of ages, and mistakes inevitably attendant on all human affairs, become uncertain and difficult to reconcile with the principles of justice. Hence, the legislature intervenes to remove such difficulties, uncertainties, and mistakes, by a new law. This new law, to the extent that it goes, necessarily takes the place of all others. For it would be illogical to contend that the old rule must stand, as well as the new one, because this would not remedy the evil sought to be removed and avoided.

Judged upon these principles, the statute law found in the Code, and such others as may have been since enacted on the subject of wills, in this State, include the whole law upon the making of wills, and their revocation, and the making of other wills in the place of those revoked. Rev. Code, sec. 420, Chap. II., *ad finem*. A will made in conformity with the requirements of this law, without fraud or undue influence, is valid as a testamentary disposition of the maker's estate. But if it is not so made, it can have no force as a will. Under this statute, the revocation by cancellation or obliteration, by the testator himself, destroys the instrument. From the date of the revocation, the will revoked ceases to be a testamentary disposition of the maker's estate. Such revoked will is nothing. It can have no effect as a will. And if the party who made it desires to make a testamentary disposition of his estate, he must make a new will, in the manner required by the statute. But in doing this, he may use the same form of words, without varia-

tions or with variations, as often as he pleases, and the same written or printed document that was used at first, but the process of making the will must be the same each time; that is, it must be done as prescribed by the statute. By our law, there can be no republication of a will that has been revoked by tearing off the names of the maker and the attesting witnesses, unless the will is re-signed and re-attested, as required by the statute. The signing of the will and the attestation of this signature are essential formalities that cannot be dispensed with. Rev. Code, secs. 1910, 1930–31; Powell's Distr. v. Powell's Legatees, 30 Ala. 697, 705; Riley v. Riley, 36 Ala. 496; 1 Redf. Wills, p. 191, bottom, secs. 206–7. The charge asked, as above set out, was confined to the instrument offered for probate in this case. The proof in this instance is not sufficient to establish the republication of such a will. Where a testator has made two wills, and wishes to destroy the one last made, and revive the one first made, both of which have been duly executed, he may do so by the cancellation or destruction of the last made will, and the due republication of the previous will.[1] But this due republication of the previous will cannot be made of a will mutilated and canceled by the testator himself, without a re-making of the same, as required by the statute. Otherwise, a paper without the signature of the testator, and without attesting witnesses, might become a will. This, except in certain cases (and this is not one of the excepted cases), the law forbids. Rev. Code, secs. 1932–4, 1936; Jackson v. Holloway, 7 Johns. 394; Jackson v. Rodgers *et al.*, 9 Johns. 312; 1 Redf. Wills, p. 354, bottom, secs. 373–4; James v. Marvin, 3 Conn. 576; 10 Bac. Abr.; Bouv. p. 505. A republished will is a new will, and it must have all its parts complete. 1 Williams on Ex'rs, 113, 121, margin. This instrument cannot be made a new will without the testator's signature, and the signatures of the proper number of attesting witnesses. These requisites it does not possess. Rev. Code, sec. 1930; 1 Redf. Wills, 347, bottom, *et seq.*

In all matters in relation to the evidence and mode of proceeding in the court of probate on the contest of a will, where there is no special exception, the court must proceed and be governed by the same rules and regulations as courts of common law. Rev.

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[1] See Index, "Republication."

Code, sec. 1962. In such a contest, the legatees are competent witnesses[1] for the proponent, or for the contestant. Rev. Code, sec. 2704; Pamph. Acts 1866–67, p. 335, No. 403. The court did not err in permitting one of the legatees to testify in favor of the validity of the will.

The conduct of the trial is under the sound discretion of the court. The court may therefore allow a witness to be called back for re-examination, but cannot compel either party to call back his witness, unless he choose to do so. In case a witness is so called back after being dismissed by the party who summoned him, be becomes the witness of the party calling him back against the objection of the other party; and such witness cannot be impeached by the party so calling him back. In this view of the law the contestants were not injured, as the testimony strengthened their case.

The other exceptions are such as are not likely again to arise on a new trial. I therefore omit their consideration.

The judgment of the court below is reversed, and as the parties are entitled to a trial by jury (Rev. Code, sec. 1956), the cause is remanded and a new trial is ordered.

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[1] As to the competency of witnesses, see the laws of the respective States. See also Index, "Witnesses."

CHAPTER V.

FORM, NATURE, AND SCOPE OF WILLS.

I.—The form of the instrument.
II.—Conditional wills.
III.—Contracts concerning testamentary dispositions.
IV.—Joint, simultaneous, double, alternative, and duplicate wills.
V.—Incorporation by reference.
VI.—Illegal provisions and incapable beneficiaries.
VII.—Nuncupative wills.
VIII.—Conflict of laws.
IX.—Miscellaneous.

Thus far we have considered the history of wills, the testamentary capacity of testators, and the formalities now required to effect due execution, revocation, and republication. In the present chapter we are to take up the form in which the testamentary instrument itself may be cast, and its scope, nature, and characteristics.

I. THE FORM OF THE INSTRUMENT.

(*a*). *The materials to be used.*—The statutes of wills require wills (except those known as nuncupative wills, which will be considered hereafter) to be in writing. But they do not prescribe the particular material with which the writing shall be effected, nor the material of which the instrument itself shall consist. As to the latter, paper or parchment is of course the usual and appropriate substance employed, but the modern test is the adaptability of the material to receive and retain a legible and permanent impression, and to furnish a medium suitable for the uses called for in connection with a testamentary instrument. Thus, it has been held in Pennsylvania that a will written on a slate cannot be probated, on the ground that it is too susceptible to erasures and substitution of provisions to render it worthy of serious consideration.[1] It is always true, of course, that the use of unusual

[1] Reed v. Woodward, 11 Phila. 541.

or inappropriate materials may raise a *primâ facie* presumption that the instrument so executed could not have been seriously intended by testator as a solemn will. But in such cases, where peculiar circumstances are proved showing that testator employed the best materials he could obtain, and could not risk delay, it is believed that all reasonable leeway would generally be allowed, in order to sustain a will in other respects duly executed.[1] As to the materials with which the will may be written, the usual and proper method is of course to employ pen and ink. But a printed or engraved form answers, though the statute requires "writing."[2] For printing is writing.[3] And so a will may be valid though wholly written and signed in lead pencil.[4]

(*b*). *The language employed.*—A valid will may be written in any language understood by testator.[5] Thus, in the case of a will written in French, by an American residing in France, a certified copy of which, with a translation, was admitted to probate in New York, the court say:

"Objection was made that the English copy of the will contained in the record was no part of the probate. We think it was. It appears in 2 Redfield on Wills (2d ed.), p. 45, that 'It is requisite, where the will is in a foreign language, that the probate should contain a translation of the same in English,' and such plainly must be the law. Suppose a will be executed in Latin, Greek, or Arabic, with the formalities required by our statute, what is to be done with it when it is presented for probate? Its execution must be proved in English. The precise language in which the will is written is of little significance; whether it be in our language or another is of little importance. The will of the testator is to be

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[1] The will may be written on separate sheets, fastened together only with a pin. In Goods of Braddock, 1 P. D. 433. When they are found fastened together, the presumption is that it was done by testator. Rees v. Rees, L. R. 3 P. & D. 84.

[2] In Goods of Adams, L. R. 2 P. & D. 367.

[3] Temple v. Mead, 4 Vt. 535; Henshaw v. Foster, 19 Pick. 312.

[4] Myers v. Vanderbelt, 84 Penn. St. 510; Goods of Dyer, 1 Hagg. 219; though the use of a pencil is a circumstance to be considered if testator's *intent* to make a formal will is in question. Rymes v. Clarkson, 1 Phillim. 33–4–5.

[5] If the writing is blind or obscure, the court may send it to a master, or take other steps to have it deciphered. Masters v. Masters, 1 P. Wms. 421 (425).

ascertained from the meaning which he has expressed, in whatever language; and that meaning, put into proper English, must, in a court required to use the English language, be taken as the testator's will and placed upon record. There can be no necessity for recording it in the foreign language; and yet the practice of recording in both languages, where that can be done, is quite proper. It was the duty of the surrogate, in this case, to ascertain what the will of the testator, written in a foreign tongue, was; and the translation which he has recorded must be treated as part of his decree, unassailable collaterally, like the rest of it."[1]

The important question in such cases often is whether the testator understood the provisions of the will. As where the will is in English, and the testator did not understand that language, the mere fact that he executed it does not raise the usual *primâ facie* presumption that he knew its contents.[2]

(*c*). Passing now from the questions arising out of the use of a foreign tongue, to the form of instrument that may be employed, the first principle is that any phraseology and any form will answer, if only the necessary intent is shown, and testator expresses his purposes so that they are capable of being understood, and executes the instrument according to the requirements of the controlling statute of wills.

The test of whether a given instrument unusual or extraordinary in form is in fact a will, is the intention of the testator.[3] It is sometimes said that in order to make a will the testator must know that he is doing so.[4] This is of course true in those jurisdictions where the testator is required to "declare" to the witnesses that the instrument is his will. But in other jurisdictions the true test is not testator's realization that the instrument is a *will*, but his intention to create *a revocable disposition of his property to accrue and take effect only upon his death*;[5] if he intends this, then the law calls the instrument a will, whether

[1] Caulfield v. Sullivan, 85 N. Y. 153 (161).

[2] See Miltenberger v. Miltenberger, 78 Mo. 27. For the usual presumption of knowledge, arising from the fact of execution, Robinson v. Brewster, 30 N. E. Rep. (Ill.) 688.

[3] Sharp v. Hall, 86 Ala. 110.

[4] Lyles v. Lyles, 2 Nott & McC. (S. C.) 531.

[5] Habergham v. Vincent, 2 Ves. Jr. 231.

he knew it by that name or not; his lack of acquaintance with the proper legal name is of no consequence. The testator must have the *animus testandi*, which is defined in Sheph. Touchstone, 204 (referred to in Sewell v. Slingluff, 57 Md. 537, 547), as the intention to dispose of property in the event of death.

It will be noticed that in jurisdictions where the statutory requirements concerning execution are greatly detailed, there is much less opportunity for discussion concerning the character of an instrument offered for probate. But in none of them is the mere form of the instrument in which testator's expressions of intention are cast controlling.

Illustrations.

(*a*). Will in form of a letter.[1]

(*b*). Will in form of an assignment.[2]

(*c*). Will contained in the same instrument with a power of attorney.[3]

(*d*). Will constituting one portion of a contract.[4]

(*e*). Will consisting solely of the expression of a wish.[5] As when the entire body of the will, preceding the signatures, was:

"I wish Mym Sister, Louisa Cock, of 104, York Road, Lambeth, to have my Schering [Charing] Cross bank-book, for her own use."[6]

(*f*). Will merely naming executor and making no disposition of property.[7]

The foregoing wills were all sustained, as representing a testamentary intent.[8]

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[1] Estate of Knox, 131 Penn. St. 220, given *ante*, p. 217; Barney v. Hays, 29 Pac. Rep. 282; Cowley v. Knapp, 42 N. J. L. 297.

[2] Robinson v. Brewster (Ill.), 30 N. E. Rep. 683; Doe dem. Cross v. Cross, 8 Q. B. 714.

[3] Doe dem. Cross v. Cross, 8 Q. B. 714; Rose v. Quick, 30 Penn. St. 225.

[4] Reed v. Hazleton (Kan.), 15 Pac. Rep. 177.

[5] Matter of Wood, 36 Cal. 75.

[6] Cock v. Cooke, L. R. 1 P. & D. 241.

[7] Barber v. Barber, 17 Hun (N. Y.) 72; 1 Wms. on Exrs. 227.

[8] For further illustrations of valid informal wills, duly executed under the

(*g*). Rev. Edward O'Connell wrote a letter, dated Dec. 8th, 1874, beginning "My dear Christina,—this is my last will and letter to you," and stating how his property should be divided. Among other phrases indicating testamentary intent, he said, "I leave my plate and the family plate to Mrs. Towers," etc. The letter closed, "your affectionate brother, Edward O'Connell." Held, to have been intended for a will, and to be void for lack of due execution.[1]

(*h*). H. F. Wood, the testator, duly executed in conformity with the California statute, the following instrument: "I wish five thousand dollars to go to John C. Cole in the event of my dying intestate, and the balance of my property to be held by Robert C. Beatie to be disposed of by him as his judgment may dictate.

H. F. Wood.

San Francisco, Cal., February 5th, 1863.

Witness: S. H. Seymour, Wm. H. Ladd.
Warrensville, Lycoming Co., Penn."

This was held to be a good will.[2]

(*i*). A mere memorandum direction, "at my death my estate or my executor to pay to July Ann Cover the sum of three thousand dollars," signed, sealed, and witnessed, is not an agreement. It is a will, and void if not duly executed as such.[3]

(*j*). An instrument beginning, "To all people to whom these presents shall come," and in form a deed of gift in consideration of love and affection, and duly executed under the statute of wills, was held, in view both of its terms and of extrinsic evidence showing intention, to be a will.[4]

(*k*). Where, after testatrix had duly executed a will she executed

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local law, compare Mosser v. Mosser, 32 Ala. 551; Rue High's Appeal, 2 Dougl. (Mich.) 515; Habergham v. Vincent, 2 Ves. Jr. 204 (231); Passmore v. Passmore, 1 Phillim. 218; Masterman v. Maberly, 2 Hagg. 235 (248); Goods of Colyer, 14 P. D. 48; where the form of the will is peculiar, so that its testamentary character appears from its own face doubtful, extrinsic evidence is admissible to show its true character: Jones v. Nicholay, 2 Roberts. 388; Thorncroft v. Lashmar, 2 Sw. & Tr. 479; Patterson v. English, 71 Penn. St. 454.

[1] Towers v. Hogan, 23 L. R. (Ir.) 53.
[2] Matter of Wood, 36 Cal. 75.
[3] Cover v. Stem (Md.), 10 Atl. Rep. 231.
[4] In Goods of Slinn, 15 P. D. 156.

a paper headed "This is not meant as a legal Will, but as Guide," the latter cannot be admitted to probate as a will.[1]

(*l*). An uncle and nephew formed a partnership as physicians. The articles of copartnership contained the following provision, namely, that in case of the uncle's death, all his property, personal and otherwise, which he held in partnership at the time of his death, should go to the nephew. Held that the provision was testamentary, and, not being duly executed as a will, was void.[2]

Selected cases further illustrating unusual forms of wills may be found *post*.

WILL IN ENGLISH.—FOREIGN TESTATOR.

In re Walter's Will.

WISCONSIN SUPREME COURT, 1885.

(The Reporter, Vol. XXI. 95.)

APPEAL from Sheboygan County.

Application for probate of a paper purporting to be the last will of Minna Walter, deceased, written in English. She was a German and did not understand the English language. The paper was drawn in English at her request, and was interpreted to her. The application was granted, and this appeal was taken from the decree of probate.

Lyon, J.—The question of law presented by this appeal is: Should an instrument executed with all the formalities which the law makes essential to a valid execution of a will, which purports to be the last will and testament of the deceased person so executing it, and which expressed his will and intentions, be denied probate for the sole reason that such person did not understand the language in which the instrument was written? This is an interesting, and, perhaps, an important question. It has not heretofore been raised in this court to our knowledge, and the industry of counsel has failed to find a direct adjudication elsewhere. However, in Redfield on Wills, to the statement in the text that "it seems to be well settled that the testator may put his will in any language he may choose," there is a note in which the author says: "We doubt it the common law will allow of a written will being expressed in a language not understood by the testator. That

[1] Ferguson-Davie v. Ferguson-Davie, 15 P. D. 109.

[2] McKinnon v. McKinnon, 46 Fed. Rep. 718.

would seem indispensable to any understanding execution of the instrument." Vol 1, page 166 (4th ed.), note 8. No case or authority is cited to support the opinion intimated in the last extract. The reason given for this opinion is, in effect, that a person cannot have an understanding of the contents of an instrument unless it be written in a language he knows. True, he may not get such understanding by reading the instrument himself, but there are other methods by which he can be accurately informed thereof, although he may not be able to read understandingly a word of the instrument. A vast amount of accurate knowledge is alone imparted to the mass of mankind by means of translations from languages understood by but few. Such is the foundation of our belief in very many most important accepted truths in theology, science, and history. Important writings are frequently signed without perusal, the signer relying upon the statement of another, who knows what the instrument contains, as to its contents. If the information states such contents truly, the signer knows just what he has signed. Were an issue made up as to whether the signer of a written instrument knew its contents when he signed it, and the proof should show that he never read it, but was accurately informed of its contents orally, before he signed it, by a person who had read it, the issue would necessarily be found in the affirmative; that is, that the signer knew the contents of the instrument. There can be no doubt, we think, that a person who signs an obligation or promise, with knowledge of its contents, imparted to him by parol, is liable thereon, although it may be written in a language he does not understand. The question is not by what means or instrumentalities the signer was informed of the contents of the instrument, but did he know its contents when he signed it? No good reason is perceived why this is not also true of wills. Of course it is essential to a valid will that the testator should have had an intelligent understanding and comprehension of its contents when he executed it. The formalities required by law in the execution of wills are prescribed for the purpose (among others) of preserving satisfactory evidence that the testator in each case had such understanding of the contents of his will. But the law does not require that he shall read his will before execution, or be able to read it, as a condition as to its validity. If such were the law, the blind, or those persons who from illiteracy or other

cause are unable to read, could never make a valid written testament. The same would be true of many persons who may desire to execute a written will when *in extremis*, and who are otherwise competent to do so. It has long been held that persons thus circumstanced may execute valid written wills. And if the will of any such person is drawn in accordance with his instructions, although not read over to him, it seems now to be settled that, if otherwise sufficient, it is a valid will. 1 Redfield on Wills, p. 57, c. 3, sec. 6, § 5. We perceive no substantial difference in principle between the cases above referred to and one in which a will is drawn up in a language which the testator does not understand. In cases belonging to either class the court should require satisfactory proof that the testator was correctly informed of the contents of the instrument he was about to execute. [Goerke's Will (Wis.), 50 N. W. Rep. 345.] Such proof was made in the present case, and in addition thereto it was proved that the instrument was drawn in strict compliance with the instructions of the testatrix in that behalf. In view of the well-known fact that quite a large percentage of the people of this State do not understand the English language, and of the probability that many wills of such people, written in English, have been admitted to probate, we should adopt the rule here suggested, even though the argument against it were much stronger than it is. Otherwise great mischief might be done by defeating the real will of the testators, carefully expressed, and duly verified in the manner prescribed by statute, and by unsettling estates supposed to be settled, and divesting rights of property believed to be fully vested. If the same circumstances had existed generally in this country when Judge Redfield wrote the intimation above mentioned, we greatly doubt whether he would have thought that the rule there suggested (even conceding it to be a rule of the common law) was at all applicable to the condition and circumstances of our people. Our conclusion is that, because the instrument in question was freely executed by the testatrix in due form of law, with full and accurate knowledge of its contents and in accordance with her instructions (she being of sound mind), it was properly admitted to probate, and established as her last will and testament, notwithstanding it was written in the English language, which she could not read or understand.

Judgment affirmed.

INFORMAL WILL.

In the Goods of W. Coles.

ENGLISH COURT OF PROBATE, 1871.

(L. R. 2 P. & D. 362.)

William Coles, of Victoria Terrace, Caledonian Road, Middlesex, died on the 26th of May, 1871, leaving a paper executed in the presence of two witnesses, beginning "I have given all that I have to Bertha Chamberlain and her two sons," etc. The paper was dictated by testator, who distinctly directed the use of the words "I have given," saying that nothing would be plainer. After the paper had been executed, the testator gave it to one of the witnesses, Mr. Gray, telling him that as soon as the breath was out of the deceased's body he was to take it to Mr. Williams, the trustee named in it.

LORD *Penzance*.—The question is, is this paper testamentary? A case was decided by me some time ago (Cock v. Cooke, 1 P. & D. 241) of a somewhat similar character. The principle is plain that where a paper is intended by the testator to take effect after his death, it will be admitted to probate, whatever may be its form. Although this paper contains the word "given" instead of "give," the court cannot hesitate to say that the testator meant that the property should pass on his death, he could not mean to make over all his property to the persons mentioned at once. It is, I think, obvious that there is a greater probability that the testator intended the parties to take on his death, than that he should denude himself of everything in his lifetime. This last supposition is most improbable. I think, therefore, the paper is testamentary.

WHETHER DEED OR WILL.—TEST.

Jordan v. Jordan's Administrator.

ALABAMA SUPREME COURT, 1880.

(65 Ala. 301.)

Action for conversion, brought by the administrator of the estate of Mrs. Elizabeth G. Jordan and others. The defendants claimed title under an instrument executed by Mrs. Jordan, and offered in evidence as a deed of gift. The administrator objected to its admission in evidence on the ground that it was in fact a will. It

was admitted that it had never been admitted to probate as such. The defendants also offered in evidence an instrument purporting to be a deed of land, the admission of which was also objected to. The court sustained both objections, and the defendants excepted.

The facts are stated in the opinion.

Brickell, C. J.—Any instrument in writing, whatever may be its form, executed in conformity to the provisions of the statute of wills, manifesting a posthumous destination of property, real and personal, can take effect only as a will; and rights under it cannot be asserted or recognized, until it has been admitted to probate in the proper form. Dunn v. Bank of Mobile, 2 Ala. 152; Shepherd v. Nabors, 6 Ala. 631; Gilham v. Martin, 42 Ala. 365; Daniel v. Hill, 52 Ala. 430; Elmore v. Mustin, 28 Ala. 309; Kinnebrew v. Kinnebrew, 35 Ala. 625. It is not a matter of moment, what is the designation of the instrument upon its face, nor how it may have been received and acted upon by the parties having beneficial interests under it. The true inquiry is, as to the effect and operation the party making it intended it to have. A will is defined to be an instrument by which a person makes a disposition of property to take effect after his death; and as its operation is postponed during life, it is, *in its own nature*, ambulatory and revocable. It is this ambulatory and revocable quality which distinguishes it from deeds and other similar instruments of transfer or conveyance, taking effect, if at all, at the time of execution. Not that instruments of transfer or conveyance must necessarily pass present, immediate rights of possession or enjoyment; but, whatever is the right or interest created, it must pass at the time of execution. When the interest is created and passes by such instruments, the postponement of possession or enjoyment, or of vesting, is produced by the *express terms*, and not by the *nature* of the instrument. The illustration usually given in the books is of a deed by which the grantor limits lands to the use of himself for life, with remainder to the use of A in fee. The usufructuary enjoyment is precisely the same, as if he should by his will devise such lands to A in fee. The difference between the two, however, is apparent. Immediately upon the execution of the deed, the remainder in fee vests, though possession and enjoyment is postponed. By no act of the grantor can it be revoked, annulled, defeated, or impaired. The execution of the will passes no estate, vests no title, creates no

interest or right; all are dependent upon the death of the testator, in whom resides the absolute, unqualified power of revocation, though it is not reserved or expressed.

It is often a matter of extreme difficulty to ascertain, when an instrument is unskillfully drawn—when it employs alike apt words of conveyance and of devise, or bequest, commingles provisions often found in deeds, with provisions generally found in wills; and there is an express postponement of possession and enjoyment until after the death of the party executing it—whether it is intended as testamentary, or as a conveyance operating presently to create estates, rights and interests, which are irrevocable. It is the intention of the party executing, to be collected from the terms of the instrument, when these are read in the light of surrounding circumstances, which must prevail.

The instrument proposed to be introduced as the evidence of the appellants' title, and of the divestiture of the title of the intestate, Mrs. Jordan, was executed and delivered by her; and it is properly executed either as a will or as a deed. It disposes of money then in the possession of the intestate, and of money to be raised by a sale of personal property not otherwise specifically disposed of; and contains directions as to the burial and decoration of the grave of the maker. It commences with the words: "For and in consideration of the love and affection I have for the following named persons, I do give, grant, and convey to each one of them"; and it concludes, "and I also further request and enjoin upon my son, David C. Jordan, that he take charge of, and manage in the interest, and to the benefit of my daughter, Arethusa A. Jordan, all the real and personal property herein and elsewhere *deeded* unto her, the said Arethusa A. Jordan. I also further request that my sons, Alexander Jordan and David C. Jordan, shall take charge of all the real and personal property herein and elsewhere *deeded*, and that they proceed to place the owners thereof in possession of the same, with the least delay and expense possible, *after my death*"; followed by the testimonial clause usual in deeds. There cannot be any particular importance attached to the word "*deeded*," though, in popular acceptation, it signifies a transfer by deed, found in the concluding clause of the instrument which we have quoted. In a preceding part of the instrument is found this clause, "The proceeds of all the personal property and effects not otherwise herein

bequeathed," which signifies a disposition by will. These words were doubtless used loosely and carelessly, and do not afford any valuable aid in arriving at the intention of the donor. That is more satisfactorily ascertained from a careful consideration of the whole structure, and all the terms of the instrument, to which we are confined, there not being any evidence of the circumstances surrounding the donor when it was executed, which would aid in ascertaining the intention. From the whole structure, and all the terms of the instrument, we are satisfied it is strictly testamentary —that it was intended by the donor as a disposition of all her personal property, to take effect after her death.

The sons, David C. and Alexander Jordan, are not nominated as executors; but the duties they are required to perform, are strictly executorial. It is only after the death of the donor, that they have capacity or authority to take any step; and then it is that they are to take charge of all the property, the money on hand, and the other property of which disposition is made, and to place the owners in possession. An irrevocable disposition of money in the possession of the donor, and of which, during life, possession is to remain with him, is not usual, nor can it be supposed it was in this instance contemplated. It would scarcely have been a violation of duty and of good faith, which a court of equity would have intervened to prevent, if the donor had made a hazardous loan, or an injudicious investment of the money, after the execution of the instrument; nor can we suppose that, under any circumstances, the aid of the court could have been invoked, to compel her to give security for its payment on her death; or that a receiver would have been appointed, to hold it during her life, that on her death it should reach the destination given it by the instrument. Nor can it be supposed that it was the intention, if from any cause the identical money on hand at the execution of the instrument should have been lost or converted, and at her death there was [*sic*] other moneys sufficient to meet the dispositions of the instrument, that the right of the donees should not attach to such moneys—that their rights were confined and limited to the identical money in the hands of the donor when the instrument was executed. Yet, if it is a deed, speaking and taking effect from its execution, that would be the consequence; while, if it is a will, speaking and taking effect from the death of the

donor, their rights would attach to the moneys then on hand. Again, the disposition is of all the personal property of the donor; and if it be a deed, it strips her of all right and interest therein, except possession during her life. It is evident, portions of this property must be consumed in the use, and much of it was of that kind which may be designated *perishable*. If the instrument was irrevocable—if it was a deed, and she was limited to the use for life—she would have been subject to disturbance by the donees in remainder, if wasteful in the use, or negligent in the care of the property. Again, the gift to the daughter Arethusa, of other things, is of "a horse to be selected of her own choice out of my stock of horses; also, twelve months' support out of any provisions or proceeds of the crops grown upon my place." This, taken in connection with the gifts of feather-beds to her children and grandchildren, and with the directions for the burial and decoration of the grave of the donor, indicate that her purposes were testamentary. And when the instrument is examined in all its parts—when the consequences of construing it as a deed, and the character of the property upon which it operates, are considered—we cannot avoid the conclusion, that it is strictly testamentary; if these consequences had been explained to the donor, at the time of its execution, and of her the inquiry had been made, whether she intended conveying an interest that would vest before her death, and would be irrevocable, that she would have answered it negatively; that her purpose was a disposition taking effect on her death, leaving her during life the unqualified dominion of ownership, with all its incidents.

The instrument executed on the same day, purporting to be a conveyance of lands, is, doubtless, the instrument referred to as passing property "*elsewhere deeded*." That it may and ought to be looked to, in determining whether the instrument under which title to the personal property is claimed is a deed or a will, we do not doubt. All contemporaneous instruments, referring the one to the other, should be considered in construing either; and when two instruments have been contemporaneously executed, the one in form a will, and the other a deed, the nearness of the one act to the other has induced the courts to regard them as one. 1 Jarman on Wills, 15. It will not follow, however, because the instrument relating to the lands is a deed, that the instrument relating to the

personalty would, of necessity, be a like conveyance. An argument could be drawn, of more or less importance, from the fact, dependent upon the uncertainty in which its doubtful and ambiguous terms might leave the mind. If the two instruments were embodied in one, yet, it could be testamentary in one part, and a present conveyance in another. Kinnebrew v. Kinnebrew, 35 Ala. 628. Without determining whether the instrument relating to the lands should be regarded as testamentary, or as a deed, it is too variant and distinct in its terms to control the dispositions of the personal property.

The rulings of the Circuit Court were in conformity to these views, and its judgment must be affirmed.

[Also for valuable discussion and application of the same principles, Williams v. Tolbert, 66 Ga. 127; Nichols v. Chandler, 55 Ga. 369; Robertson v. Smith, L. R. 2 P. & D. 43; Sperber v. Balster, 66 Ga. 317; Reed v. Hazleton (Kan.), 15 Pac. Rep. 177; Lautenshlager v. Lautenshlager, 80 Mich. 285; Cover v. Stem (Md.), 10 Atl. Rep. 231; Goods of Slinn, 15 P. D. 156; McKinnon v. McKinnon, 46 Fed. Rep. 713; Turner v. Scott, 51 Penn. St. 126. Georgia has a statute on this point, but it merely embodies the general rule.]

WILL IN FORM OF AN ASSIGNMENT.

Robinson v. Brewster.

ILLINOIS SUPREME COURT, 1892.

(30 N. E. Rep. 683.)

ERROR to Circuit Court, Macon County.

Bill to set aside the will of Joseph Robinson. A decree was entered in accordance with a verdict sustaining the will. Complainants bring error.

Joseph Robinson signed, in the presence of two attesting witnesses, an instrument in the following form:

"Know all men by these presents, that I, Joseph Robinson, for the consideration of one dollar, to me in hand paid, as well as my affection, do hereby assign and set over to my daughter Eliza Jane Brewster all of my property, both personal and real, to have the

same after my death. Witness my hand and seal this 7th day of May, 1877.

JOSEPH his X mark ROBINSON. [Seal.]

Attest: J. S. Post. E. McClellan."

Magruder, C. J. [After quoting the paper propounded, names of parties, etc., and giving testimony of witnesses, and finding, 1, that the instrument was duly executed, and, 2, that there was no error in the admission of certain evidence objected to on the trial.] "3. As to the form of the instrument. 'A last will and testament may be defined as the disposition of one's property to take effect after death.' 1 Redf. Wills (4th ed.), p. 5, c. 2, sec. 2, par. 1. The instrument in controversy is a disposition of property to take effect after death. It is testamentary in character, and wholly executory. The daughter was not to have or become the owner of the estate until her father's death. The vesting is deferred, both in interest and possession, until the death of the maker. The statement to McClellan that he was making his will, and request to McClellan to come and witness the will, made, as such statement and request were, only a few moments before signing the paper, so as to be really a part of the *res gestae*, indicate that it was Robinson's intention to make this instrument his will." (Citing numerous authorities. The court here find certain objections to the charge of the trial judge unfounded.)

The decree of the Circuit Court is affirmed.

POWER OF ATTORNEY AND WILL IN SAME INSTRUMENT.

Doe on the demises of Elizabeth Cross vs. Cross.

COURT OF QUEEN'S BENCH, 1846.

(8 Q. B. 714.)

EJECTMENT.

On the trial before *Platt*, B., at the last *Oxfordshire* Assizes, it appeared that the title of the lessor of the plaintiff depended on the effect of a certain instrument, executed by *Peter Cross*, then tenant in fee simple of the property and a soldier on service in the West Indies. This was in form a power of attorney to his mother, *Elizabeth Cross*, widow, to receive and retain the rent,

etc., "until I may return to England." It then proceeds: "or, in the event of my death, I do hereby, in my name, assign and deliver to the said *E. C.* the sole claim to the before mentioned property, to be held by her during her life, and disposed of by her as she shall deem proper at the time of her death: at the same time I wish it to be understood that I claim all right and title to the said property on my arrival in Great Britain, when the term of the said *E. C.'s* occupancy shall be considered at an end. In witness," etc. The instrument was attested by witnesses, and its execution satisfied the statute of wills.

Peter Cross afterwards died in *India*, never having returned to *Great Britain*, leaving *Elizabeth Cross* surviving him. The title of the plaintiff's lessor came through this instrument as a devise to *Elizabeth Cross*. The question was, whether it constituted a *will*.

Verdict for plaintiff on the ground that the instrument was a will subject to leave to move for nonsuit.

KEATING now moved according to the leave reserved.

Williams, J.—The power of attorney operates in one event only, and for a certain time. But it by no means follows that the instrument may not take effect as a will, in the event of the party's death.

Wightman, J.—Mr. *Keating* appears to admit that this instrument would be a will if it contained only the disposing part. But it does not follow, from the other provisions being inserted, that such part is not to operate.

(Lord *Denman*, C. J., and *Patteson*, J., delivered opinions to the same effect.)

Rule refused.

[For a discussion of an instrument containing both a contract and a will, see Reed v. Hazleton (Kan.), 15 Pac. Rep. 177.]

II. CONDITIONAL WILLS.

A testator may, if he wishes, make a *conditional* will, which, upon his death, will or will not be his last will according as the condition has or has not happened. The condition, in such cases, is usually the death of the testator while on a certain journey, or before a certain time, etc. In given cases, it is often a perplexing

question whether testator has in fact intended to make a conditional will to take effect only in case the specified contingency happens, or whether, on the other hand, the likelihood that the contingency would happen acted upon testator's mind merely as an incentive to make a will with the intention that having once made it, it should hold good at his death whether the contingency had in fact happened or not. If there is any doubt, the courts will lean heavily in favor of holding the will unconditional.[1]

An important distinction is here also to be noticed between a conditional will (where the will does not take effect at all unless the condition is fulfilled), and a will containing a conditional legacy or devise. In this latter case the will itself holds good in any event, and it is only the particular legacy or devise which fails if the condition is not fulfilled.[2]

CONDITIONAL WILL.

In the Goods of John Moss Winn (deceased).

ENGLISH COURT OF PROBATE, 1861.

(2 Sw. & Tr. 147.)

John Moss Winn duly executed a testamentary paper bearing date the 18th of December, 1849, commencing in the following words: "Be it known unto all men that I, John Moss Winn, of Birkenhead, in the county of Chester, formerly a bookkeeper, but now out of business, being on the eve of embarking for San Francisco, South America, or Mexico, do hereby, in the case of my decease during my absence being fully ascertained and proved, do and will over the whole of my furniture, etc., or any property of whatsoever description," for the joint support of his wife and children during the wife's widowhood, and in case of her second marriage for the children, and appointed his brother William Henry Winn and a Mr. M'Culloch, executors.

John Moss Winn sailed for San Francisco in January, 1850, the will being deposited with his brother. He returned to England in June, 1852, and William Winchester, who was one of the attesting witnesses of the will, deposed that during John Moss Winn's

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[1] Cody v. Conly, 27 Gratt. (Va.) 313; Goods of Porter, L. R. 2 P. & D. 22.

[2] Damon v. Damon, 8 All. 192.

stay in England, he frequently mentioned to the deponent that he intended the will made by him on the 18th of December, 1849, prior to his going to San Francisco, and which was then deposited with his brother William, to continue in force in case of his death during the time he should be away on a voyage he then intended to make to Australia.

In July, 1852, Winn left England for Australia, and the last thing which had been heard of him was a letter from him received by his wife, which bore date the 11th of September, 1853. Thus, in the end of 1860, the presumption of law arose that he was dead. William Winn died in August, 1852, and the paper in question was found among his papers by his executor, and the widow now asked for letters of administration with the will annexed.

Dr. *Swabey* moved accordingly.

Sir *C. Cresswell.*—In the present case the condition seems absolutely a condition precedent. Again, can I, since the Wills Act, admit evidence of such declaration of the deceased as are now before me? Would it not be making a will by word of mouth? You had better consider this point.

Dr. *Swabey*, referring to Parsons v. Lanoe, 1 Ves. Sen. 190, said that in that case Lord Hardwicke held similar words, "If I die before my return from my journey to Ireland," to be an absolute condition, and, under the Statute of Frauds, considered that he was not at liberty to admit parol evidence to show adherence after the return from Ireland. Thus unless the court can in the present case disconnect the words "during my absence" from the "San Francisco or Mexico," it would seem that Parsons v. Lanoe must govern it.

Sir *C. Cresswell.*—I am afraid it must be so. The court is unwilling by reason of such expressions to set aside testamentary papers, which probably contain the deceased's intentions, but the present words are too clear to admit of any doubt as to their legal construction.

Motion refused.

WHETHER CONDITIONAL.—TEST.

In the Goods of Dobson.

ENGLISH COURT OF PROBATE, 1866.

(L. R. 1 P. & D. 88.)

WILLIAM DOBSON died on the 21st day of November, 1865, leaving a will of the 29th of January, 1863, which commenced with the following words: "January 29th, 1863. Thursday morning. In case of any fatal accident happening to me, being about to travel by railway, I hereby leave all my property to," etc., etc. The testator did not die upon the journey which he took immediately after executing this will, and a question was raised in the registry whether it was contingent on that event.

DR. *Spinks* moved for a grant of administration with the will annexed.

SIR *J. P. Wilde*.—I am unwilling to refuse probate of a testamentary paper on the ground that it was contingent, unless it is clear that the testator intended that it should operate only in a certain event, or during a certain period. In the Goods of Winn[1] was a case in which the court felt constrained to hold that the will was contingent. In that case the words were: "Being on the eve of embarking for San Francisco, South America, or Mexico, I do hereby, in the case of my decease during my absence being fully ascertained and proved, do and will over the whole of my furniture, etc., or any property of whatsoever description," etc. Parsons v. Lanoe[2] was cited in that case, and both were instances in which the court saw, that the testator had expressly limited the operation of the will to a certain time, and accordingly refused probate of it. But this case goes by no means so far. The testator's meaning seems to me to have been this: "My mind is drawn to the consideration that all railway travelling is attended with danger, and therefore I think I had better make my will." Administration with the will annexed will therefore be granted.

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[1] 2 Sw. & Tr. 147.

[2] 1 Ves. Sen. 190.

CONDITIONAL WILL.

Appeal of Joseph M. Morrow.

PENNSYLVANIA SUPREME COURT, 1887.

(116 Penn. St. 440.)

Petition to admit to probate a paper alleged to be the last will of Thomas W. Morrow. Application denied by the register of wills of Perry County, and appeal dismissed by the Orphans' Court of said county. Appeal to the Supreme Court.

On Monday, September 14, 1885, deceased, a farmer, who was engaged in drilling wheat on his farm, broke his drill, and was obliged to take it to Landisburg to be repaired. Before he left home he executed the following paper:

"I am going to town with my drill and i aint feeling good and in case if i shouldend get back do as i say on this paper tomey and robert is to pay they last layment one this place Samuel nows his payments Joseph you are to have that land and town property and pay Magy $3.00 dollars $1.00 dollar a year without interest tomy Miten is to have his colt fore fredum.

tomy and robert is to settle up and make sail and devide the money equil amung my five boys this i write down and sign to my will.

THO. W. MORROW."

On his way he fell seriously sick, the next Thursday was brought home still sick, grew worse, and on the following Monday died.

The opinion in the Orphans' Court was rendered by

Barnett, P. J. (After stating facts.)

We have been referred by the able and zealous counsel of the proponent to the following authorities:

Jarman on Wills, 5 Amer. ed. p. 28. It is there said, "A will may be made so as to take effect only on a contingency, and if the contingency does not happen the will ought not to be admitted to probate." In note 2, there are cited several examples of contingent wills, among others the following: A person intending to go to Ireland made his will in these words: "If I die before my return from my journey to Ireland, I direct," etc. The testator went to Ireland, returned to England, and died some years after-

wards. It was held by Lord Hardwicke that the will was contingent, depending upon the event of the testator returning to England or not. As he did return the will could have no effect, but was void: Parsons v. Lanoe, 1 Vesey Sr. 190. The will of a mariner commencing, "Instructions to be followed if I die at sea or abroad," is conditional: Lindsay v. Lindsay, L. R. 2 Prob. & Div. 459. In Kentucky a will saying, "If I never get back home I leave you everything I have in the world," was held to be contingent: Maxwell v. Maxwell, 3 Metc. 101. In Damon v. Damon, 8 Allen 192, the will began: "In the name of God, Amen! I, J. W. D., being about to go to Cuba, and knowing the dangers of voyages, do hereby make this my last will and testament," etc. "First. If by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife A.," etc. He then went on to give other specific devises. He returned from Cuba and died two or three years afterwards. The will was admitted to probate, but it was held to be conditional as to the first clause. On the other hand, in Tarver v. Tarver, 9 Pet. 174, the will began: "In the name of God, Amen! Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament." Mr. Justice THOMPSON said: "And it is contended that the condition upon which this instrument was to take effect as a will, was his dying on the journey and not returning home again. But such is a very strained construction of the will and by no means warranted. It is no condition, but only assigning the reason why he made his will at that time. But the instrument taking effect as a will is not made, at all, to depend upon the event of his return or not from his journey. There is no color, therefore, for annulling this will on the ground that it was conditional."

Walkem on Wills, page 257: The author says: "Papers propounded as wills are frequently contingent or conditional in form, and difficulty is sometimes experienced in determining whether or not, in the events that have happened, the will is to take effect. The question turns upon the point whether the contingency is referred to as the occasion of making the will, or as the condition upon which the instrument is to become operative." "Where the will is made dependent on a condition precedent, it cannot be

upheld as a will unless the condition is performed. Thus, where the deceased, a master mariner, whilst on a voyage, wrote with his own hand a will which commenced:—'This is the last will and testament of me, in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, that I give and bequeath,' etc. The court held that the dispositions of the will were dependent on the event referred to at the beginning of it, and that it had therefore only a contingent operation and probate was refused," and refers to In the Goods of Robinson, L. R. 2 Prob. 171, and other cases cited in the note. On the other hand a will in these words: "I, W. M., being physically weak in health, have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig Appelina to the floating hospital ship Berwick Walls, in order to recruit my health, and in the event of my death occurring during such time, I do hereby will and bequeath," etc., was held not to be conditional. And a will commencing with the words: "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," etc., was held not to be contingent on the testator's death on that journey.

3 Phil. 397, Strauss v. Schmidt, is to the effect that a conditional will may be established by subsequent recognition.

4 Swab. & Trist. 36; In the Goods of George Thorne, deceased. The deceased died in London in September, 1864, leaving a paper writing dated at the Gold Coast of Africa, on 2d November, 1863, containing *inter alia* as follows: "Be this known to all concerned: I request that in the event of my death while serving in this horrid climate, or any accident happening to me, I leave and bequeath to my beloved wife," etc. "I consider that every person should be prepared for the worst, and particularly in such a treacherous climate as this, which is considered one of the worst in the world, which has compelled me to write this letter." It was held not necessary to limit its operation to the event of death while on the Gold Coast.

2 Bradf. 204: In *ex parte* Lindsay: the will contained:—"According to my present intention, should anything happen me before I reach my friends in St. Louis, I wish to make a correct disposal," etc. The testatrix went to St. Louis, returned to New York, and died there more than a year after the date of the will.

The will was admitted to probate, the surrogate saying: "There is another question necessary to be determined in this class of cases, and that is, whether the words clearly express a contingency upon which the instrument is to take effect, or whether they may fairly be interpreted as indicating the cause or occasion of making the will; whether, in the language of Sir John Nicholl, 'it is an absolute condition, or dependent upon any particular motive operating at the time.'" The surrogate cites the following cases: In Burton v. Collingwood, 4 Hagg. 176, the will began: "March 5, 1814. Morning, near one. All men are mortal, and no one knows how soon his life may be required of him. Lest I should die before the next sun, I make this my last will and testament," etc. Eighteen years afterwards the will was held not to be contingent, and was admitted to probate. In Forbes v. Gordon, 3 Phill. 625, the words:—"In case of my inability to make a regular codicil to my will, I desire the following to be taken as a codicil," etc., were held not to be conditional. In Bateman v. Ponnington, 3 Moore, P. C. C. 223, the instrument was written in ink, but dated and signed in pencil, with the addition: "In case of accident, I sign this will." The testator died more than three months afterwards, and the will was admitted to probate. In the Goods of Ward, 4 Hagg. 179, the paper propounded contained the expression: "I mention these matters thus particularly, to serve as a memorandum for you, in case it should be the Lord's will to call me hence by any fatal event in the voyage or journey before us." The paper was rejected, but the testator had made a subsequent altered will. In Sinclair v. Hone, 6 Ves. 608, the contingency expressed in a codicil was: "In case I die before I join my beloved wife"; it was held to be contingent, and defeated by failure of the condition.

3 Bradf. 366, in Thompson v. Conner, the testator, Charles Stephenson, bequeathed to his cousin, Margaret Baxter, three hundred dollars; "this gift and bequest being subject to the following condition, viz.: that the said Margaret Baxter shall produce from the officers of the ship in which I shall sail on my next cruise, satisfactory evidence of my decease during the same." His will was admitted to probate, the surrogate saying: "Doubtless, the possibility of death during the contemplated cruise was considered, and led to the incorporation of the condition in the will; but then the condition refers primarily to evidence, or in other

words, he does not give only upon condition he should die during that voyage, but that certain specified proof of his death shall be produced." The foregoing cases illustrate very fully the difference between the contingency which furnishes the occasion or motive, and is given as the reason for making the will at that particular time, and the contingency upon which the instrument is to take effect; the contingency which must happen before the instrument becomes a will at all. It is the certainty of death and the uncertainty of the time thereof that leads to the making of a will. The undertaking of a perilous journey, or the probable exposure to more than usual accidents, may furnish the occasion for making a will at a particular time; but although the time of making has been hastened by the apprehension of danger, the testator does not consider the instrument inoperative, or regard any further disposition necessary merely because the danger has been survived. When, however, the ordinary uncertainties of human life have not been carefully provided against, and circumstances may now postpone the opportunity for doing so, a crude instrument of testamentary character is sometimes made to bridge over the chasm, and become operative only upon some designated contingency, which shall prevent the execution of a maturely considered will. It is objected by his administrators against the writing left by Thomas W. Morrow, that it belongs to this latter class; that it is a contingent will, and the contingency not having happened, that the will is void. They rely upon the case of Todd's Will, 2 W. & S. 145. And it was upon the authority of that case that the register refused admission to probate. The will of George Todd began as follows: "My wish, desire and intention now is, that if I should not return (which I will, no preventing Providence), what I own shall be divided as follows," etc. C. J. GIBSON refers to the cases of Parsons v. Lanoe, and Sinclair v. Hone, *supra*, in which the wills were held to be contingent. "But," he says, "an intention to make the operation of the paper eventual, is not near so apparent in either of these cases as it is in the one under consideration"; and the sentence of the court below refusing probate was affirmed. In the case at bar we think the will illustrates both sorts of contingency; that which urged to the present making of the instrument, and that upon which the instrument itself was to take effect. "I am going to town with my drill and I aint feeling

good," was the contingency suggesting the propriety of making the will. "And in case *if* I shouldend get back, do as I say on this paper," contains the contingency upon which the will should become operative. It is very clear that the will is not *presently* operative. He does not say: "I hereby give and bequeath"; there is no immediate gift. He does not say absolutely, "do as I say on this paper"; *some* time at least *must* elapse after his departure for town, before any such duty is imposed. The command is provisional: "*if I shouldend get back* do as I say on this paper." It is plain, that *his failure to return*, is the condition precedent required before the instrument can become effectual. If it was ineffectual until there was a failure to return, and if there was no such failure, it is also plain it never became effectual; that it was a contingent will, and became void by the non-happening of the contingency.

In Todd's Will the expression is, "if I should not return, what I own shall be divided as follows." In Morrow's Will the expression is, "if I shouldend get back do as I say on this paper." If I should not return, and if I shouldend get back, are forms of expression so plainly equivalent, that we are unable to see any distinction or difference between them. Notwithstanding the able argument of proponent's counsel, we are of opinion that the register's decision was right in principle, and obedient to the authority of Todd's Will, and must therefore be affirmed. And now, 4th November, 1886, the decision of the register is affirmed.

Thereupon the proponent took the present appeal and assigned for error the affirmation of the register's decree refusing to vacate the letters granted, and to admit the alleged will to probate.

In the Supreme Court (before *Mercur*, C. J., *Gordon*, *Trunkey*, *Sterrett*, *Green*, and *Clark*, JJ.; *Paxson*, J., absent), the opinion was written by

Green, J.

It is scarcely possible to add anything to the very lucid and exhaustive opinion of the learned court below in this case. We agree entirely with the conclusion arrived at and the reasoning in support of it. The authorities cited are numerous and altogether convincing in their character. Our own case of Todd's Will, 2 W. & S. 145, is exactly in point and controls the present con-

tention. The essential words there were, "if I should not return, . . . what I own shall be divided as follows." The words here are, "in case if I shouldend get back do as I say on this paper." The meaning in both these cases is the same. A testament is to take place if there is no return. But there was a return in both instances, and the testament does not transpire. There is no will because the condition on which it was to come into existence has not occurred. In both cases the deceased did return.

It is useless to speculate as to what the deceased would have done had he foreseen the precise facts which were to happen. He has made no provision for them. The condition which he has expressed is one which attaches to the operation of the instrument, and the effect of this is strongly expressed by GIBSON, C. J., in Todd's Will case, thus: "No text writer seems to have distinguished between a condition attached to a particular testamentary disposition, and a condition attached to the operation of the instrument." But in Parsons v. Lanoe, 1 Ves. Sr. 191, Lord Hardwicke said without hesitation that he would not require an authority for such a distinction, and that a paper subject to a condition ought not to be admitted to probate after failure of the contingency on the happening of which it was to have taken effect. "Why should it be proved as a will when it could not have the effect of one?" And so here. The decedent did return from the journey he was about to take, and the contingency upon which the paper was to take effect as a testament did not happen. Whether the journey was long or short is not material, it is the fact of the return which defeats the contingency. It is true he was sick at his return, but as he lived several days after, this fact also is immaterial. Further discussion seems unnecessary.

Decree affirmed.

[Further illustrations may be found in the following cases. *Conditional:* Goods of Porter, L. R. 2 P. & D. 22; Dougherty v. Dougherty, 4 Metc. (Ky.) 25; Maxwell v. Maxwell, 3 Metc. (Ky.) 101; Robnet v. Ashlock, 49 Mo. 171; Roberts v. Roberts, 2 Sw. & Tr. 337. *Absolute:* French v. French, 14 W. Va. 458; Goods of Mayd, 6 P. D. 17; Burton v. Collingwood, 4 Hagg. 176; Thorne's Case, 4 Sw. & Tr. 36; Martin's Case, L. R. 1 P. & D. 380.

See also Goods of Cawthorn, 3 Sw. & Tr. 417, where a will conditional in form was not duly executed until *after* the condition named had become impossible, and it was held absolute.]

III. CONTRACTS CONCERNING TESTAMENTARY DISPOSITIONS.

Every one,—with certain exceptions already considered,[1]—is at perfect liberty to make an agreement concerning the disposition to be made of a part or the whole of his real or personal property at his death.[2] Such an agreement often assumes the form of a contract to make a will containing certain provisions, or, in some instances, a contract not to make a will containing certain provisions. It may be either oral or written, and, if duly entered into, and apart from questions arising under the Statute of Frauds, will be valid and binding.[3]

These propositions are all simple and obvious. From them, however, arise a number of questions that have caused a good deal of discussion. These questions concern the practical results of such contracts, and the methods of enforcing the rights of the other party.

First, let us consider the case of personal property, and an agreement by its owner to bequeath it, or a specified portion of it, to another. Here, if there is a valid consideration for his promise, and if, at his death, no such bequest has in fact been made, the amount due may be recovered by suit against the estate of the decedent.[4] Neither the omission to make any will, nor the making of a will disposing of all testator's property in other directions, nor any other device or neglect, can deprive the other party to the contract of his right to enforce his claim against the estate.[5] The consideration for the promise may be an under-

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[1] *Ante*, pp. 1–12.

[2] See Davis v. Hendricks, 99 Mo. 478; Snyder v. Snyder (Wis.), 45 N. W. 818.

[3] See an elaborate note, citing many authorities, in 66 Am. Dec. 783.

[4] Wellington v. Wellington, 145 Mass. 69; Bird v. Pope, 73 Mich. 483; Lisle v. Tribble (Ky.), 17 S. W. Rep. 742.

[5] Bird v. Pope, 73 Mich. 483; Carmichael v. Carmichael, 72 Mich. 76; Bolman v. Overall, 80 Ala. 45; s. c. 86 Ala. 168; Starkey's Appeal, 61 Conn. 199.

taking duly performed on the part of the proposed legatee to care for the owner of the property, or to render other services,[1] or to release an existing claim,[2] or anything else that would constitute, on ordinary principles, a sufficient consideration for a contract to pay money. And whatever the consideration may be, the contract must, of course, be fully performed on the part of the proposed legatee, in so far as such performance is a condition precedent, in order to entitle him to enforce his claim against the estate.[3]

Second, it is obvious that when the agreement relates to real property, certain new elements, not usual in case of personal property, are introduced into the discussion. For in the first place, the contract must satisfy the provisions of the Statute of Frauds concerning real estate transactions.[4] A mere oral contract to devise land is, therefore, not enforceable,[5] unless there has been performance by the other party on his part such as to satisfy the statute.[6] And a contract to give to another, by will, all one's property, both real and personal, falls within the scope of the Statute of Frauds.[7] In the next place, the method of enforcement may be different from that usual in case of personal property. For here the proposed devisee may recover the land itself, by suit against subsequent grantees with notice, or against the heirs, or devisees, of the decedent, as the case may be. See cases cited in note in 66 Am. Dec. 787. Under the present head must also be classed cases where the contract, though relating to personalty, is of such a character,—as where it relates to a family portrait, or heirloom, or patents, etc.,[8] that equity will grant specific performance.

This equitable remedy is often, and with strict propriety, spoken of as specific performance. But the exact meaning, in

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[1] Whetstine v. Wilson (N. C.), 10 S. W. Rep. 471.

[2] Andrews v. Brewster, 124 N. Y. 433.

[3] For a case where services were rendered without any definite agreement concerning a legacy, compare Porter v. Dunn, 131 N. Y. 314.

[4] Where the property is personal, the fact that the contract may be performed within a year saves it from the statute. Kent v. Kent, 62 N. Y. 560.

[5] Gould v. Mansfield, 103 Mass. 408.

[6] Carmichael v. Carmichael, 72 Mich. 76; Johnson v. Hubbell, 10 N. J. Eq. 332.

[7] Gould v. Mansfield, 103 Mass. 408.

[8] 2 Story, Eq. Jur. § 717 *et seq.* Robinson on Patents, § 1228.

this connection, of the term "specific performance," is worthy of a more careful attention than it has always received. For what is decreed in the cases under consideration, is the specific performance of the essence and not the letter of the agreement between the original parties. What the decedent agreed was, in essence, that at his death the other party should become the owner of the land (or of the portrait, etc.). The additional promise that he would make a *will* containing a *devise*, or *bequest* of the specific property to the other party, went merely to the method of effecting the agreed result. Now if the owner dies without making such a will, it is clear that the court cannot make a will for him, or incorporate into any will he may have made, a clause giving the specific property to the plaintiff in the suit.[1] Nor would there be any advantage in adopting such a course even if it were possible. What the court can do, and will do, is to compel the holders of the legal title with notice to convey to the plaintiff, thus in effect carrying out the contract in full, although the default of the decedent has made it impossible to render the plaintiff an actual devisee or legatee as was proposed by the terms of the contract. Understood in this accurate sense, it is exactly proper to say that the courts will enforce specific performance of the contract. But it is not correct to say that they can enforce the specific contract to make a will.

The importance of this distinction lies chiefly in the fact that these cases of contract to make wills, with their attendant enforcement by specific performance, and the consequent inability of the owner, after once making such a contract and embodying it in a will, to effect any change in the ultimate disposition by revoking the will, have led to frequent suggestions, in more or less definite form, that such cases form, in effect, an exception to the universal rule that every will is "ambulatory" or revocable in whole and in part, during the life of its maker. In fact, they form no such exception. The element of revocability forms an essential feature of every correct definition of the term will. If an instrument is not revocable, it is not a will. The fact is that a will such as that just mentioned, executed in conformity with an agreement to devise, is revocable like every other will. Its

[1] Bolman v. Overall, 80 Ala. 451 (455).

maker may revoke it, and may execute another will omitting the proposed devise. And when he dies, such later will must be admitted to probate regardless of the agreement.[1] And if he simply revokes the first will, embodying the proposed devise, and makes no other, the revoked will cannot be admitted to probate, even though the agreement is offered in its support. In fine, the contract that on the death of the owner the other party shall have the land, holds good against the owner's heirs or devisees, and also against grantees of the owner with notice; but the owner's capacity to make and revoke as many wills as he pleases, even though they purport to deal with the land in question, remains unimpaired.[2] The form of the action for relief will of course be regulated in each case by the situation of the parties and the particular state of the facts.[3]

These questions concerning contracts to make wills often arise in connection with "joint wills," where each party makes his will in favor of the other, and where each will forms the consideration for the other. In such cases, if the one first dying fails to keep his agreement, the fact that the survivor did make his will as agreed, does not form a consideration such as to entitle him to enforce performance, for he may still revoke his own will, and is therefore in no worse position than if the agreement had never been made.[4] The following cases will illustrate the methods adopted by the courts in practically working out the problems here discussed.

AGREEMENT TO DEVISE.—SPECIFIC PERFORMANCE.

David C. Parsell v. Abraham Stryker et al.

NEW YORK COURT OF APPEALS, 1869.

(41 N. Y. 480.)

Suit for specific performance of an agreement to devise certain real estate.

Judgment below for plaintiff. Affirmed at General Term. Appeal.

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[1] Bolman v. Overall, 80 Ala. 451; s. c. 86 Ala. 168.

[2] For a long and elaborate discussion of the law governing contracts to make a will, consult the dissenting opinion of Dunne, C. J., in Eldred v. Warner (Ariz.), 25 Pac. Rep. 800.

[3] See cases, *post*.

[4] Gould v. Mansfield, given *post*.

David Parsell, deceased, was the grandfather of plaintiff, and of Hannah, wife of defendant Stryker. Deceased owned certain premises in question, and in January, 1854, made an agreement with plaintiff, the effect of which is stated in the opinion, by which he promised, in consideration of certain conditions to be performed by plaintiff, to give the farm, on his death, to plaintiff, and to make a will devising the same to plaintiff. On June 1, 1858, the grandfather executed a deed of the same premises to defendant Stryker, took back a mortgage, and assigned the latter to Stryker's wife Hannah, to secure the support of deceased's wife and child. He also made a will revoking all former wills and not devising the premises to plaintiff. Plaintiff was in possession and Stryker and wife knew of his agreement with deceased; but plaintiff did not know of deceased's deed, mortgage, or will of June 1, 1858. In August, 1858, the grandfather died. Plaintiff, relying on the grandfather's agreement, fully performed all the conditions on his part, both before and after the conveyance to defendant, and down to the grandfather's death.

James, J. [After disposing of certain objections to the validity of the agreement, arising out of its alleged violation of the constitutional prohibition of leases of agricultural land for more than twelve years.]

The agreement under consideration is very simple in intent and purpose, and sufficiently clear in expression to be fully understood. There is no imputation of fraud or undue influence in its procurements. It is said to be a hard and unconscionable agreement; but, considering the relation, situation, and age of the parties, and the incumbrance attached to the farm in the support and maintenance of the two women, it is relieved even from that imputation. The proposition came from the grandfather; it said in substance, I am an old man, eighty years old, with no family but a wife and imbecile daughter; I have this farm, and so much stock, farming implements, etc.; I am too feeble to carry on the farm; you take it and work it on such terms as long as I live, and at my death you shall have all there is on the farm, and I, by a last will and testament, will devise it to you free of all claim except for the support of my wife and daughter, Margaret, for life. The proposition was accepted, and, as the referee finds, performed by the plaintiff. As between the parties, the agreement was fair;

it was supported by a sufficient consideration as between them, even though inadequate as between strangers; it was therefore valid; and the plaintiff entitled to a specific performance of its obligations.

[The court then overrule certain exceptions to rulings of the referee at the trial.]

The agreement in question was in legal effect a sale and purchase of the farm; under it, until a breach at least, the equitable title was in plaintiff, the nominal legal title in the grandfather. His conveyances to Stryker only passed the same nominal legal title, subject to plaintiff's equitable title, as Stryker received his deed with full knowledge of plaintiff's possession and rights.

Had Stryker made known to plaintiff the conveyances to him, he could have availed himself of the covenants to the grandfather; but as no notice of such conveyance was given to the plaintiff, his performance to the grandfather was a legal performance of the agreement. The mortgage passed no greater rights than that possessed by the mortgagor. (2 Story's Eq. 784.)

As to plaintiff's equities, it made no difference whether the agreement was to deed the farm at a future day, on performance by plaintiff, or to devise the farm by a will made in the lifetime of the party, a court of equity will decree the specific performance of the latter agreement after death, where otherwise unobjectionable, equally with a contract to convey while living.

This question was fully considered and properly decided in Johnson v. Hubbell, in the Court of Chancery in New Jersey in 1856, of which I find a report in the American Law Register, vol. 5, page 177 [10 N. J. Eq. 332]. On this branch of the case Chancellor WILLIAMSON said, "There can be no doubt but that a person may make a valid agreement, binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure; and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune,

and the sole and best judge as to the manner and time of disposing of it. A court of equity will decree the specific performance of such an agreement, upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction." (Rivere v. Rivere, 3 Dessau. Rep. 195; Jones v. Martin, 3 Ambler 882; 19 Vesey 66; 3 Ves. 412; Podmore v. Gurnsey, 7 Simons 644 to 654.) The validity of an agreement to devise land by will was recognized by this court in Stephens v. Reynolds, 6 N. Y. 458.

The foregoing are all the questions presented on the argument of this appeal. We think the case was properly disposed of by the referee, and that the order of the General Term affirming the judgment below should also be affirmed.

All the judges concurring in the result, judgment affirmed.

[Compare Cole v. American etc. Society (N. H.), 14 Atl. Rep. 73. An agreement to give a legacy for services, if sufficiently clear and definite, will, if no legacy is in fact given, raise a claim against the estate, and if indefinite, a claim may be based on *quantum meruit*. Robinson v. Raynor, 28 N. Y. 494; Martin v. Wright, 13 Wend. 460. See Shakespeare v. Markham, 72 N. Y. 400 (s. c. 10 Hun 311); Eaton v. Benton, 13 Hill (N. Y.) 576.]

AGREEMENT NOT TO DEVISE.

Taylor v. Mitchell et al.

PENNSYLVANIA SUPREME COURT, 1878.

(87 Penn. St. 518.)

Error to the Court of Common Pleas.

Ejectment.

The plaintiff claimed under a certain agreement executed August 5th, 1862, by which William Carson, his grandfather, agreed that "I shall not, nor will I by deed, mortgage, sale, judgment, *devise* or otherwise, prejudice or interfere with the rights of the said John Carson and Nancy McFadden [a son and daughter], as my heirs-at-law, as to their free and equal share in all my real estate, but the same shall remain free and uncontrolled, to be divided equally *amongst all my legal heirs*, including the said John and Nancy, at my decease."

The title of defendants' lessors rested on a will subsequently

executed by said William Carson on August 18, 1869, devising the land in question to certain of his heirs, excluding plaintiff. William Carson died in 1871.

Verdict for plaintiff, subject to the opinion of the court. If in the opinion of the court the plaintiff had title, judgment on the verdict for plaintiff. The court, however, entered judgment for defendants *non obstante veredicto*.

Trunkey, J.

William Carson's deed, dated 5th August, 1862, is so far from being testamentary that it contains his covenant not to devise his real estate. The sole question is, whether that covenant shall prevail against his will. A valuable consideration is set forth, namely, a conveyance, for the benefit of said William, by John Carson and Nancy McFadden, of their title and interest in a tract of land which they inherited from their mother; and, for that, said William covenanted, "that I shall not, nor will I by deed, mortgage, sale, judgment, devise or otherwise, prejudice or interfere with the rights of the said John Carson and Nancy McFadden, as my heirs-at-law, as to their free and equal share in all my real estate, but the same shall remain free and uncontrolled, to be divided equally amongst all my legal heirs, including the said John and Nancy, at my decease." The plain meaning is, that for a valuable consideration, the covenantor agreed to hold his real estate unencumbered, free, and uncontrolled, to be divided amongst his heirs. Had he contracted, for some consideration, to sell his land and give possession at his death, and make provision for conveyance, after his decease, to such persons as should be his heirs, the intent would not be more obvious. For purpose of reaching the like end he covenanted to stand seised to the use of his heirs.

John Carson and Nancy McFadden were children of William, who also had two other children by his second wife. That natural love and affection of the parties to this deed, for the other children, likewise moved them to so stipulate, is manifest from the relationship; and were such motive necessary, it is not essential that it be expressed: Fisher v. Strickler, 10 Barr. 348. Little need be predicated of this farther than showing one object of the covenantees was prevention of the very thing attempted upon the plaintiff.

William Carson died seised of the land, and the devisees stand in his shoes. They are not innocent third persons. Had he died intestate his heirs could not violate the contract; no matter if the deed is not, in strictness, within the statute of Uses and Trusts, 27 Hen. 8, and the conveyances which sprung up in consequence thereof. The consideration was not money, necessary to *a bargain and sale*, nor blood or marriage, necessary to *a covenant to stand seised to uses;* but it was a valuable one, and between the parties and privies, sufficient to support a contract to hold the land for use of his heirs, their possession to commence at his death. Each party, equitably interested, can recover his portion, in his own name, and is not bound to resort to a personal action for damages.

Judgment reversed, and judgment is now entered for the plaintiff upon the verdict.

ORAL AGREEMENT TO DEVISE.—STATUTE OF FRAUDS.

Mary Gould vs. Edward Mansfield and others.

MASSACHUSETTS SUPREME JUDICIAL COURT, 1869.

(103 Mass. 408.)

Chapman, C. J.—The bill states, in substance, an oral agreement between the plaintiff and Nancy Gould, deceased, the testatrix of the defendant executors, the purport of which was, that each of them should make a will in the other's favor, and give and devise thereby all her property, both real and personal, to the other, and that neither of them was to make any different will at any time, or to dispose of her property in any different manner therefrom. The plaintiff alleges that the said Nancy did make her will accordingly, and informed the plaintiff thereof, and thereupon the plaintiff made her will in accordance with the agreement, and did not revoke it during Nancy's lifetime, or make any different will; that Nancy stated the agreement to divers persons during her lifetime; that the plaintiff performed services for Nancy, and expended money for her, under the belief that such a will existed; but that Nancy made another will, which has been proved and allowed, giving her property to others. The wills were to be of all the real and personal property which they had, but no property is mentioned as being included in them except a

house, which they owned in common, and in which they lived together. The personal estate, if any, seems to have been of minor importance, and the agreement in respect to it is not divisible from that relating to the real estate.

Among other defences set up, the statute of frauds is pleaded, and it is contended by the defendants that this was a contract for the sale of lands within that statute. On the contrary, the plaintiff denies that it is a contract for a sale within the statute.

If we look at the character of the act to be done, we find that a will is considered in the nature of a conveyance by way of appointment. Harwood v. Goodright, Cowp. 87, 90. "It doth as effectually give and transfer estates, and alter the property of lands and goods, as acts executed by deeds in the lifetime of the parties." 1 Shep. Touch. 402. A devisee comes within the legal definition of one who takes by purchase. Watkins on Descents, 155. And the contract set forth in the bill is a contract to convey, by the act alleged, a title in fee simple to lands for a consideration. In Harder v. Harder, 2 Sandf. Ch. 17, such a contract was held to be within the statute of frauds; and in Walpole v. Orford, 3 Ves. 402, Lord Chancellor Loughborough so regarded it. See also Browne on St. of Frauds (3d ed.), sec. 263. In the recent case of Caton v. Caton, Law Rep. 1 Ch. 137, and 2 H. L. 127, the same doctrine was held. We see no ground to differ from these authorities, and must regard it as a contract for the sale of lands, within the statute of frauds.

There has been no part performance which amounts to anything. The plaintiff says she made a will devising her property to Nancy. But such an instrument was ambulatory, and might have been revoked by various acts, or by implication of law from subsequent changes in the condition or circumstances of the testator. Gen. Sts., c. 92, sec. 11. The plaintiff's property is still, as it has always been, in her own hands, and subject to her own control. The services rendered and money paid by the plaintiff are not alleged to have been in part performance of the contract.

It is unnecessary to consider the provision of the statute of frauds as to the personal property, it being indivisible from the real estate in respect to the alleged contract, if indeed there be such property of any considerable value.

These views being fatal to the plaintiff's case, it is not necessary to decide the other questions discussed.

Demurrer sustained.

[To the same point, Manning v. Pippen (Ala.), 11 So. Rep. 56; Ellis v. Cary, 74 Wis. 176. Also cases cited in note in 66 Am. Dec. 788.]

Until lately an oral agreement founded on a sufficient consideration to make a certain provision by way of *legacy* by will for a particular person was valid in Massachusetts. Wellington v. Apthorp, 145 Mass. 69. But now by statute such an agreement to be valid must be in writing, and signed. Krell v. Codman, 154 Mass. 454.

EXECUTED CONTRACT TO DEVISE.

Tuit v. Smith.

PENNSYLVANIA SUPREME COURT, 1890.

(137 Penn. St. 35.)

Appeal from Court of Common Pleas.

Sterrett, J.—Both parties to this action of ejectment claim under Sarah Smith, who purchased the house and lot in controversy in October, 1884, and, in consideration of plaintiff's agreement to support and maintain her during life, etc., conveyed the same to him by deed dated August 29, 1885. The record of that deed, together with plaintiff's agreement and bond of even date therewith, was given in evidence, and relied on by him as evidence of title and right of possession. The defendant, on the other hand, relied on a prior contract, of a somewhat similar nature, between Mrs. Smith and himself, not in the form of a conveyance or agreement to convey the property in controversy to him, but evidenced by a testamentary paper executed by her in October, 1884, wherein she devised the house and lot to defendant, " for his kindness and care toward me in sickness and in health, in watchfulness and care during all my natural life, and at my decease the aforesaid property shall belong to the said Laura E. Smith, his heirs or assigns, with all rights, liberties, and hereditaments forever. . . . It is my will and desire that the said Laura E. Smith have possession of my house on the first day of

November, 1884, and he take me with him, and that he take care of me as one of his own family." It was admitted that, in pursuance of what is contained in the paper, and in accordance with the mutual understanding and agreement of both parties, the defendant went into possession, and took Mrs. Smith with him as a member of his family. She selected her rooms in the house. They were comfortably fitted up for her, partly with her own furniture which she had before, and partly with furniture procured by defendant. She remained there as a member of the family until the following September, and then left without assigning any satisfactory cause for so doing.

When this case was here in 1889, it was held, in an opinion by our Brother GREEN, that the testamentary paper above referred to might operate as a memorandum of contract for the sale of land sufficient to comply with the statute of frauds, and, as such, it was admissible in evidence during the lifetime of the testator; that such a paper, without evidence of anything done under it by the devisee, cannot be treated as anything more than a will, revocable at the pleasure of the testator; but, when the testator has put the devisee in possession of the land, and the latter has complied with his part of the agreement, the devise loses its revocability, and must be treated as an executed contract. 127 Pa. St. 341, 17 Atl. Rep. 995. The defendant on this trial, undertook to prove, and did successfully show, that he was put in possession of the property in controversy by Mrs. Smith, and that he substantially complied with his part of the contract by taking her with him and caring for her "as one of his own family." The plaintiff undertook to rebut the evidence thus introduced by defendant, but, aside from showing some slight annoyances and inconveniences, such as are likely to occur in any ordinary family, the case was not successfully assailed. Mrs. Sarah Smith, the old lady who conveyed the property to plaintiff, was his main witness, and, assuming her testimony to be true, there is nothing in it to justify her in rescinding the contract with the defendant, and on the faith of which he expended money in the improvement of the property. The witness was 90 years old, and testified in a rambling and incoherent manner, such as might be expected in one of her advanced years. In answer to the question, "How did the defendant treat you while you were staying with

them?" her answer was: "Well, only sometimes he would take a spurt in ugliness; have a bad word, you know. He was just middling. I suppose he done the best he knew how." Again, in answer to the question whether defendant's wife abused her, she said: "Oh, no, not particularly, any more than she wasn't very much of a talker of a woman, nor she didn't quarrel, nor nothing of the kind." Again, in answer to the question whether the defendant offered to strike her, her reply was: "Oh, no. If he had, he would have got a black nose."

Without referring at length to the plaintiff's rebutting evidence, it is sufficient to say that there appears to be nothing in any of it that would justify a rescission of the contract in pursuance of which defendant was put in possession of the premises in controversy. In view of the insufficiency of plaintiff's rebutting testimony, the court, in defendant's first point for charge, was requested to instruct the jury "that the plaintiff had shown no facts which would justify Sarah Smith in rescinding the contract contained in her will, and therefore he cannot recover." We think this point should have been affirmed. The plaintiff was certainly in no better position than Mrs. Smith would have been if she had brought the action herself, without having conveyed the property. The case may be regarded as a close one, but, on a careful review of the evidence, we are of opinion that it should not have been submitted to the jury. Judgment reversed.

[The theory on which relief in equity is afforded in cases like those already illustrated, is that while the heirs, or devisees, or grantees with notice, as the case may be, have the legal title, they are to be regarded as trustees for the benefit of the person entitled under the contract, and held to account accordingly, by such equitable methods as may best suit the situation. Sumner v. Crane (Mass.), 29 N. E. Rep. 1151; note in 66 Am. Dec. 788. For further general cases see Hudson v. Hudson (Ga.), 13 S. E. Rep. 583; Keagle v. Pessell (Mich.), 52 N. W. Rep. 58, and Drake v. Lanning (N. J.), 24 Atl. Rep. 378. For an illustration and discussion of special relief in equity where specific performance could not be enforced, see Johnson v. Hubbell, 10 N. J. Eq. 332.]

IV. JOINT, SIMULTANEOUS, DOUBLE, ALTERNATIVE, AND DUPLICATE WILLS.

JOINT WILL.[1]

In the Goods of Letitia Lovegrove, Spinster (deceased), on Motion.

ENGLISH COURT OF PROBATE, 1862

(2 Sw. & Tr. 458.)

In this case the deceased, Letitia Lovegrove, died on the 18th of June, 1861, leaving the following testamentary paper:

"Peckham, January, 1858.

"We, Hannah Lovegrove and Letitia Lovegrove, at present living at No. 8, Pitt Street, Peckham, being desirous that, as we are now living mutually together upon the joint savings of each other, at the death of either, whichever it may please Almighty God to take first, the survivor should have all that remains, and we further desire that at the death of the said survivor, should there be any money left at her decease, we wish it to be divided between our nephews and niece hereinafter named.

. . . . . .

"Signed in the presence of each other and of both the undersigned.

"HANNAH LOVEGROVE, X her mark.
"LETITIA LOVEGROVE, X her mark.

"Witnesses,
"MARY NICHOLSON, X her mark.
"ELIZABETH ASH."

From the affidavit of John Lovegrove, it appeared that Hannah Lovegrove died in April, 1858.

. . . . . .

DR. *Swabey* moved for letters of administration with the will annexed, as the last will of Letitia Lovegrove, spinster, to be granted to John Lovegrove, her lawful nephew, and one of her next of kin, and one of the persons entitled to the residue of her personal estate undisposed of by the said will. In Hobson v.

[1] Joint wills are properly such as either dispose of a joint estate or make a joint disposition of property held separately. See "Double Wills," *post*.

Blackburn and Blackburn, 1 Add. 274, it appears that a similar paper was proved as the will of Joshua Hobson (who was in that case the first of the mutual testators who died), he having died without having altered or revoked his part thereof.[1] In the present case the survivor has died without altering or revoking her part of the document, which is, whatever its effect may be, her will.

In the Goods of Stacey, Deane 6, and In the Goods of Joseph Raine, 1 Swab. &. Trist. 144, were also cited.

Cur. adv. vult.

Sir *C. Cresswell:* I think in this case the precedent cited warrants the grant prayed.

JOINT WILL CONDITIONED ON SIMULTANEOUS DEATH.

In the Goods of Hugo.

High Court of Justice, Probate Division, 1877.

(2 P. D. 78.)

The Reverend Thomas Hugo, of the Rectory, West Hackney, Middlesex, died on the 31st of December, 1876, leaving a widow, and three sisters surviving him. On the 15th of March, 1864, he duly executed his will on a lithographed form, by which he left his whole property, real and personal, to his wife absolutely, and appointed her sole executrix. On the 12th of October, 1874, he and his wife duly executed a joint will, which commenced: "This is the last will and testament of us, Thomas Hugo and Agnes Jane Hugo, his wife, residing at the Rectory House, West Hackney, in case we should be called out of this world at one and the same time and by one and the same accident." This instrument by its terms revoked all former wills. It appeared, from the affidavit of Mrs. Hugo, that, in the month of October, 1874, her husband and herself were about to make a railway journey, and there having been then very recently a serious railway accident, they agreed to make a joint will, to take effect in the event of their meeting with such an accident, and both being killed at the same time, which accordingly her husband wrote out. They, however, returned home in safety. After the death of the de-

[1] [Also Matter of Diez, 50 N. Y. 88; In the Goods of Hugo, 2 P. D. 78.]

ceased, the joint will was found loose amongst other papers. The executors of the joint will and the sisters of the deceased consented that probate should be granted of the will of the 15th of March, 1864.

Dr. *Swabey* moved accordingly.

Sir *J. Hannen* (President). (After considering the bearing of a case cited.) Now, the question I have to consider is, whether this instrument ought to be admitted to probate at all as the will of the testator. To determine that I must see whether or not the bequests are left absolutely or only conditionally. The words are, "This is the last will and testament of us, etc., in case we should be called out of this world at one and the same time and by one and the same accident." The condition did not happen, and I consider, therefore, the will is inoperative. The same question was before the court on two occasions, In the Goods of Winn,[1] and in Roberts v. Roberts.[2] In the last case the testator executed the paper lest anything should happen to him on his passage to Wales, or during his stay there. He returned from that trip, and the court held that the paper was conditional, and on that ground pronounced against it. The observation of counsel that if the will be conditional the condition must attach to the whole document, is, I think, well founded, and therefore, when the testator revoked all former wills, he only did so subject to the happening of the contingency. I decree probate of the will of March, 1864.

SEPARATE SIMULTANEOUS WILLS.

In the Goods of Callaway.

High Court of Justice, Probate Division, 1890.

(15 P. D. 147.)

The Right Rev. Henry Callaway, late Bishop of St. John's, Caffraria, died March 26, 1890, at Ottery St. Mary, in the county of Devon. On January 17, 1888, being then resident in this country, and having resigned his bishopric, he made two wills, one disposing of his property in England, and the other disposing of his property in South Africa. The English will commenced in

[1] 2 Sw. & Tr. 147.

[2] 2 Sw. & Tr. 337; L. J. (P. M. & A.) 46.

these terms: "This is to be my last will and testament so far only as respects my real and leasehold estate and my personal estate and bona notabilia in the United Kingdom of Great Britain and Ireland, and is not intended in any way to operate as disposing of my personal and real estate in South Africa or elsewhere than in the said United Kingdom, as to which I have made a separate and independent will dated on the same day as this, and therein called my African Will." In the South African will the testator said, "I declare this to be my last will and testament except as to such real, leasehold, or personal estate, if any, as may be situate in Great Britain."

This will had been sent to South Africa to be proved; but on the executors of the English will taking it into the Principal Registry for Probate, the registrar refused probate unless the South African will were brought in.

B. Deane moved for probate of the English will alone to be granted to the executors, without calling on them to bring in the South African will, and stated that all the next-of-kin consented to this course. He referred to In the Goods of Coode,[1] In the Goods of Smart,[2] and In the Goods of Astor.[3]

Butt, J.—I think I can do for you what appears to have been done in that last case. I will direct that probate may be issued of the English will alone to the executors named therein; but an affidavit must be filed exhibiting an attested copy of the South African will, and that affidavit must be referred to in the probate as having been filed.

DOUBLE WILLS.

Sometimes two testators may execute one common testamentary instrument, each disposing of his property to the other according as one or the other may be the first to die, with or without further gifts over in remainder. Such wills are sometimes called "Reciprocal" or "Double" wills. They differ from joint wills in that they neither dispose of joint property, nor effect a joint disposition. An illustration may be found in Re Cawley's Estate (Penn.), 20 Atlantic Reporter 567, where, in the opinion, many cases are cited and discussed.

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[1] Law Rep. 1 P. & D. 449. [2] 9 P. D. 64. [3] 1 P. D. 150.

ALTERNATIVE WILLS.

Illustration.

James Hamilton, the testator, executed one will in 1871, and another in January, 1873. By a codicil to the latter, he provided that if he should die before March 1st, 1873, the will of 1871 should take effect; otherwise, the will of 1873. In fact, he died before March 1st, 1873, and, therefore, the will of 1871 was his last will.[1]

DUPLICATE WILLS.

Wills may be executed in duplicate.[2] Only one of the duplicates should be admitted to probate.[3] Revocation by testator of one, *animo revocandi*, revokes the will.[4] Whether testator had both, or only one, in his possession; and also the careful preservation by testator of one, though the other is partially mutilated, are facts bearing on the question of intent.[5] And the fact that the one copy in testator's possession cannot be found at his death, raises a *primâ facie* presumption that testator destroyed it, and so revoked both.[6]

V. INCORPORATION BY REFERENCE.

It is not essential that all portions of a will should be fastened together in one document. The fact that they are not so fastened is likely to lead to confusion and doubt, but the actual make-up of the will when executed may nevertheless be shown by both intrinsic and extrinsic evidence. So also it is sufficient if the parts are only loosely attached, as, for instance, with a pin.[7] And if they are, at testator's death, found to be in fact fastened together in any way, the *primâ facie* presumption is that it was done by the testator before execution.[8]

Sometimes outside papers and documents are, as the saying is,

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[1] Hamilton's Estate, 74 Penn. St. 69; Bradish v. McClellan, 100 Penn. St. 607.

[2] Hubbard v. Alexander, L. R. 8 Ch. Div. 738; Doe d. Strickland v. Strickland, 8 C. B. 724 (745).

[3] Crossman v. Crossman, 95 N. Y. 145.

[4] Onions v. Tyrer, 1 P. Wms. 343.

[5] Pemberton v. Pemberton, 13 Ves. 290 (310); Roberts v. Round, 3 Hagg. 548.

[6] Colvin v. Fraser, 2 Hagg. 266. [7] In Goods of Braddock, 1 P. D. 433.

[8] Rees v. Rees, L. R. 3 P. & D. 84.

incorporated into the will by reference. This is, in fact, what occurs when, for instance, a previous will, not duly executed, is revived and republished by suitable reference in a succeeding codicil. And the general rule is that any paper or document may be incorporated by proper reference.[1]

In order to incorporate a paper in a will by reference, two things are strictly necessary.

1. That it must be clearly designated by the description given of it in the will, as a then existing paper.[2]

2. That it must be shown to have been in existence at the time when the will was executed, and must be identified.[3]

VI. ILLEGAL PROVISIONS, AND INCAPABLE BENEFICIARIES.

Although, as already stated in the Introduction, the old general restrictions on the testamentary right are now removed, so that every competent testator may make such disposition as he pleases of his property by will, yet the law still imposes, sometimes by force of general principles, and sometimes by statute, some special limits beyond which no one can go.

These restrictions may be broadly classified in two general groups. The first covers certain classes of forbidden provisions, and the second covers certain classes of persons for whose benefit testamentary provisions either may not be made at all, or may not be made in excess of certain defined limits. Each subdivision of these classes belongs to one or more independent branches of the law distinct from that of wills, but it will be convenient to here summarize the more important and usual examples.

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[1] Newton v. Seaman's Friend Soc'y, 130 Mass. 91; 1 Jarman on Wills, 89. In New York it is held that no outside paper which is *testamentary in character* can be thus incorporated. Booth v. Baptist Church, 126 N. Y. 215; with which last case, however, should be compared that of Brown v. Clark, 77 N. Y. 369 (377).

[2] In Goods of Kehoe, 13 L. R. (Ir.) 13: 1 Jarman on Wills (4th Eng. Ed.; Randolph & T.'s Am. Ed.), 90, and note (*s*).

[3] Singleton v. Tomlinson, L. R. 3 App. Cas. 404. Parol evidence is admissible to identify the paper thus distinctly referred to. *In re* Almosnino, 29 L. J. Pr. 46.

I. WHAT PROVISIONS CANNOT BE MADE.

Under this head will be considered dispositions forbidden or illegal on their own account irrespective of the personality or capacity of the proposed beneficiary.

1. *Perpetuities*, and similar schemes usually classified, with greater or less accuracy, under this head.[1]

2. *Devises and legacies to charity.*—It is very common to place statutory restrictions upon such provisions either by way of limiting outright the proportionate amount which any testator may thus dispose of, or by rendering all gifts of this character invalid unless the will is executed at least a certain specified time before testator's death.[2]

3. *Provisions contrary to public policy.*—Here if a gift is provided subject to a condition hostile to public policy, the gift is good and the condition is disregarded.[3] The testator's power to make the proposed gift is thus not interfered with, but only his power to make it on such a condition.

[A clear exposition of the law bearing on a gift subject to a condition that the beneficiary should desert his lawful wife, will be found in Hawke v. Euyart (Neb.), 46 N. W. Rep. 422.]

4. *Dower; Curtesy.*—According to the common law, and in many of our States, a testator cannot by will cut off his wife's right of dower, and a testatrix cannot by will cut off her husband's right of curtesy.[4] This rule is not now universal.[5]

II. WHO CANNOT BE BENEFICIARIES.

1. *Aliens.*—At the common law, an alien could take land by devise, and could hold as against all but the State, and even against

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[1] Gray's Rule against Perpetuities; Chaplin on Suspension of the Power of Alienation; Gray's Restraints on Alienation.

[2] N. Y. L. 1860, Ch. 360, § 1; L. 1848, Ch. 319, § 6.

[3] On the subject of testamentary provisions in restraint of marriage, and the various distinctions raised by the decisions, see a full discussion in 2 Jarm. on Wills, 44. As to other conditions, see 2 Jarman on Wills, ch. xxvii. Condition not to dispute the will, Schouler on Wills, sec. 605.

[4] 2 Blackst. Comm., 126 *et seq.*, 129 *et seq.*

[5] Dower and Curtesy, Cal. Civil Code, § 173; Curtesy, Gerard on Titles to Real Estate, 166.

the State until office found.[1] The laws of our States vary among themselves on this subject, and it would hardly be appropriate here to attempt to summarize them all.[2]

2. *Corporations.*—At the common law, corporations were excepted out of the original Statute of Wills, so that no devise of land to a corporation by will was good, except for charitable uses, by the statute 43 Eliz., c. 4, which was narrowed by the statute 9 Geo. II., c. 36.[3] But they might take personal property freely by bequest, except as restricted by their charters.[4] Here, also, the statutes of our States vary widely, and the local law should in each case be consulted.

3. *Subscribing witnesses.*—As has been already seen, our statutes often render provisions for witnesses void in order to make the witnesses competent.[5] The particular law governing each case, and its bearing on the validity of provisions for witnesses, must be sought in the local statutes.

4. *Beneficiaries incompetent from public policy.*—In addition to the cases above referred to under I. 3, where the conditions imposed upon a gift itself were deemed contrary to public policy, as, a gift in restraint of marriage, irrespective of the particular beneficiary, there are special cases where the standing of the beneficiary is such as to render the approval of any provision for him, in particular, contrary to public policy. Such, for example, is the case of a beneficiary who murders the testator,[6] and, as held in Pennsylvania, a devise to an "Infidel Society."[7] It will also be noticed that the other restrictions already mentioned, on testamentary gifts to corporations, on perpetuities, on gifts to charity, and to subscribing witnesses, and also those protecting the right of dower

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[1] Fairfax v. Hunter, 7 Cranch 603. As to personal property, see 1 Blackst. Comm. 372.

[2] See Prof. Chase's note, 1 Blackst. Comm. 372; Jarman on Wills (Randolph & T.'s Am. Ed.) 185, and note.

[3] 1 Blackst. Comm. 479. For the present English law, see the statute 1 Vict., c. 26; 1 Jarm. on Wills, 65, 66.

[4] Schouler on Wills, sec. 24.

[5] *Ante*, p. 293.

[6] Riggs v. Palmer, 115 N. Y. 506.

[7] Zeisweiss v. James, 63 Penn. St. 465, where, however, the fact that the society was yet unincorporated and would probably not be incorporated by the Legislature, played some part.

and curtesy, arise, either wholly or in part, from regard for the claims of public policy either in its general scope or in its particular application. But they also, whatever the original ground of their existence, depend wholly, or chiefly, on explicit statutes, leaving to the courts the duty of applying to cases not covered by statute the general principles of the law of public policy whenever properly applicable.

[The case of Riggs v. Palmer, cited in note 6, p. 428, contains two elaborate opinions on opposing sides of the question. Compare Owens v. Owens, 100 N. C. 240.]

VII. NUNCUPATIVE WILLS.

In discussing nuncupative, or oral, wills, three periods should be considered.[1]

The first period is that preceding 29 Charles II., during which time any person might make a valid oral declaration of his testamentary wishes. This privilege was confined, at any rate during the latter part of the period, and as a general rule, to cases where the testator was *in extremis*.[2]

The second period begins with the passage of the Statute of Frauds (29 Charles II., 1676). This provided that a nuncupative will, to be valid, (1) must be made in the testator's last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprised with sickness on a journey, or from home, and die without returning to his dwelling. (2). There must also be three witnesses present at the making of the will, and (3), they, or some of them, must be specially required to bear witness thereto by the testator himself. (This latter request was known as the *rogatio testium*.)[3]

From the application of these new rules, however, three important classes of testators were excepted by the statute:

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[1] Under the law of Louisiana, the term "nuncupative" has a different meaning, well illustrated in Miller v. Shumaker, 42 La. Ann. 898.

[2] Chancellor Kent, in Prince v. Hazleton, 20 Johns. at 511.

[3] Blackstone (2 Comm. 500, 501) gives a fuller statement of this part of the statute and its provisions concerning reduction to writing and proof. It also provided that no written will should be repealed or altered by mere oral words. Compare Brook v. Chappell, 34 Wis. 405; McCune v. House, 8 Ohio 144.

1. Testators disposing of estates not exceeding £30;
2. Mariners at sea;
3. Soldiers in actual military service.

In these three classes of cases no change was made, and consequently wills falling within any one of them might still be made according to what had been, during the first period, the general law for all persons and for personal estates of every magnitude.

It is to be noticed, then, that in the second period the provisions of the general law were made much more precise and strict than before, but that nevertheless it still continued possible for all persons, *in their last sickness*, to make nuncupative wills by complying with the new requirements; and also that the new requirements had no bearing whatever on the three excepted classes. These latter were known as "privileged testators."

The third period opens with 1 Victoria, c. 26 (1837). By the Statute of Wills passed in that year, the right to make nuncupative wills was utterly swept away, except that the second and third of the "privileged classes," namely, soldiers being in actual military service, and mariners or seamen being at sea, still retain their old privilege. A testator of either class "may dispose of his personal estate as he might have done before the making of this act." Under the old law and under both acts nuncupative wills could only act upon personal property. And the same has always been true in this country.[1]

Now the statutes on this subject in some of our States are based on the provisions of the Statute of Frauds, and in others correspond more or less closely with those of the third period represented by the statute of 1 Vict., c. 26. And in detail of requirement and of phraseology the variations among all the laws are numerous and have, of course, an important bearing on the cases decided.

Except in the case of the privileged testators,[2] all nuncupative wills—where allowed at all—must be made "*in extremis*," when the testator does not expect to recover, and has no reasonable time to prepare and execute a written will.[3]

[1] Sadler v. Sadler, 60 Miss. 251; Wooldridge v. Hancock (Tex.), 6 S. W. 818; Leathers v. Greenacre, 53 Me. 561; Furrh v. Winston, 66 Tex. 521; Van Deuzen v. Gordon, 39 Vt. 111; this may, of course, be varied by statute, Ashworth v. Carleton, 12 Ohio St. 881.

[2] Leathers v. Greenacre, 53 Me. 561.

[3] O'Neill v. Smith, 33 Md. 569; Scaife v. Emmons, 34 Ga. 619; Haus v.

Except in the case of the "privileged testators," [1] a *rogatio testium*, or summoning of witnesses by testator to take notice that his oral expressions constitute his will, is essential.[2]

Light will be thrown on the meaning and scope of the statutory terms describing the "privileged classes," by the following

Illustrations.

(*a*). Soldiers in actual service.

1. The soldier, to be in "actual service," must be engaged in a military expedition.[3]

2. Thus, a soldier quartered with his regiment in barracks, is not in actual service.[4]

3. So, a soldier at home on furlough, is not in actual service.[5]

4. But he is in actual service when in the enemy's country, and liable to be called into battle at any time.[6]

5. And so, also, is in actual service, if, when on a march to meet the enemy, he is ordered into the hospital for general sickness. He is still "on the expedition." [7]

(*b*). Mariners at sea.

1. The term "mariner," [8] or sailor, is not confined to those in the navy. It applies equally to the merchant service, as, for instance, to the master of a merchant vessel.[9]

2. Nor is it confined to the common sailors only. It covers all grades and classes of persons employed on board ship. As, the purser of a man-of-war; [10] and a commanding officer.[11]

3. At sea. See Hubbard v. Hubbard, given *post*.

Palmer, 21 Penn. St. 296; Carroll v. Bonhan (N. J.), 9 A. 871; Prince v. Hazleton, 20 Johns. 503; *contra*, Johnston v. Glasscock, 2 Ala. 239.

[1] Botsford v. Krake, 1 Abb. Pr. R. (n. s.) 112.

[2] Will of Hebden, 20 N. J. Eq. 473; Dockum v. Robinson, 26 N. H. 372; Bennett v. Jackson, 2 Phillim. 190; Haus v. Palmer, 21 Penn. St. 296; Bundrick v. Haygood, 106 N. C. 468.

[3] Drummond v. Parish, 3 Curt. 522. For a general discussion see Smith's Will, 6 Phila. 104.

[4] White v. Repton, 3 Curt. 818.

[5] Smith's Will, 6 Phila. 104.

[6] Leathers v. Greenacre, 53 Me. 561.

[7] Gould v. Safford, 39 Vt. 498

[8] See Warren v. Warren, 2 R. I. 133.

[9] Goods of Milligan, 2 Roberts. 108; Goods of Parker, 2 Sw. & Tr. 375.

[10] Goods of Hays, 2 Curt. 333.

[11] Goods of Lay, 2 Curt. 375.

NUNCUPATIVE WILL.—MARINER AT SEA.

Maria L. Hubbard v. Elias Hubbard.

NEW YORK COURT OF APPEALS, 1853.

(8 N. Y. 196.)

Application for probate of a nuncupative will of William L. Hubbard.

The will was established by the decree of the Surrogate; at Special Term this decree was reversed; the General Term reversed the Special Term; and this final appeal was now taken.

William L. Hubbard was the husband of the plaintiff, and a son of defendant. He was captain and owner of a coasting schooner. On July 5, 1849, she was lying at anchor in Delaware Bay, inside the breakwater, about a mile out from land. On that day, deceased was taken suddenly sick, on board, and died. Just before his death he told several witnesses that he wished his wife to have all his property. He did not make any request to them to bear witness that it was his will. He spoke of the fact that a will he had had was destroyed, and he asked the mate to settle his affairs.

Mason, J.—It is provided in this State by statute that no nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual service, or by a mariner while at sea. (2 R. S. 60, sec. 22.) As to the wills of soldiers in actual service, and mariners at sea, they are left entirely untrammeled by our statutes, and are governed by the principles of the common law. The exception in our statute of wills in favor of soldiers and mariners was taken from the 29 Car. 2, Chap. 3, and is precisely the same, and the same exception is retained in England by their new statute of wills. (1 Vic., Chap. 26, sec. 11.) The testator was a mariner within the meaning of the statute. The courts have given a very liberal construction to this exception in behalf of mariners, and have held it to include the whole service, applying equally to superior officers up to the commander-in-chief as to a common seaman. (2 Curt. Eccl. R. 338; 1 Williams on Exec. 97.) It has been held to apply to the purser of a man-of-war, and embraces all seamen in the merchant service. (Morrell v. Morrell, 1 Hagg. R. 51; 2

Curt. R. 338; 1 Williams on Exec. 97.) This will was made at sea. In legal parlance waters within the ebb and flow of the tide are considered the sea. (Bouv. Law Dic., Title Sea; Angell on Tide Waters, 44 to 49; Gilpin's R. 528; *In re* Jefferson, 10 Wheaton R. 428; Baker v. Hoag, 3 Selden 561.) Lord Hale says the sea is either that which lies within the body of the county, or without it. That an arm or branch of the sea within the "*fauces terræ*," where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, but that part of the sea which lies not within the body of a county is called the main sea, or ocean. (Harg. Tract, Chap. 4, p. 10; Smith on the Const. of Statutes, sec. 588.) He adds, "*that is called an arm of the sea where the sea flows and reflows*, and so far only as the sea flows and reflows"; and in this he follows the exact definition given by the Book of Assizes, 22; Id. 93, and this is the doctrine recognized by the courts of this country. (Gilpin R. 524; United States v. Grush, 5 Mason 290; United States v. Willberger, 5 Wheaton 76 to 94; United States v. Robinson, 4 Mason 307, 1 Gallis. R. 626.)

The courts in England have gone to the utmost verge of construction in extending this exception in behalf of seamen. In a case which came before the prerogative court of Canterbury in 1840, when the deceased was mate of her Majesty's ship *Calliope*, and whilst the vessel was in the harbor of Buenos Ayres, he obtained leave to go on shore, when he met with a serious fall, and was so severely injured that he died on shore a few days after. Immediately after the accident he wrote on a watch bill with a pencil, his will, and which was unattested, but which was cut out and certified to by the officers on board the ship, and the court held it a good will of a seaman at sea, and ordered it to probate. (2 Curt. Eccl. R. 375.) The common-law doctrine in regard to nuncupative wills was borrowed from the civil law. (Drummond v. Parish, 3 Curt. Eccl. R. 522, 531, etc.) By the civil law the strict formalities, both in the execution and construction of nuncupative wills of soldiers was dispensed with, and although they should neither call the legal number of witnesses, nor observe any other solemnity, yet their testament was held good if they were in actual service. (Justin. Lib. 2, Title 11; 1 Lomax on Exrs. 40.) The civil law was extremely indulgent in regard to the wills

of soldiers. If a soldier wrote anything in bloody letters upon his shield, or in the dust of the field with his sword, it was held a good military testament. (1 Bl. Com. 417; 1 Lomax on Exrs. 40, 41.) The common law, however, has not extended this privilege so far as the civil. (1 Bl. Com., *supra.*) Blackstone says that soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels without those forms, solemnity, and expenses which the law requires in other cases.

The rules, however, which are to be observed in making wills by soldiers and mariners are the same by the common law, and yet it must be confessed that the formalities which are necessary to be observed in the making of wills by soldiers and seamen are not defined with any very satisfactory precision in any of the English elementary treatises upon the subject of wills. Swinburne says that those solemnities only are necessary which are *juris gentium.* (Swinburne, pt. 1, sec. 14.) Before the statute the ecclesiastical courts to whose jurisdiction the establishment of personal testaments belonged, required no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. (1 Roberts on Wills, 147.) A will of personal estate, if written in the testator's own hand, though it had neither his name or seal to it, nor witnesses present at its publication, was held effectual, provided the handwriting could be proved. (1 Roberts on Wills, 148.) And so if written by another person by the testator's directions, and without his signing it, it was held good. (Id. 148.) It is laid down in books of very high authority that a nuncupative testament may be made not only by the proper motions of the testator, but also at the interrogations of another. (Swinburne on Wills, part 1, sec. 12, p. 6; Lomax on Exrs. 38; 1 Williams on Exrs. 102.) And Swinburne says, "As for any precise form of words, none is required, neither is it material whether the testator speak properly or improperly, so that his meaning appears" (2 Swinburne, part 4, sec. 26, p. 643); and he says concerning the solemnities of the civil law to be observed in the making of testaments, soldiers are clearly acquitted from the observation thereof, saving that in the opinion of divers writers, soldiers, when they make their testaments, ought to require the witnesses to be present. (1 Swin. part 1, sec. 14, p. 94.) It is

necessary, however, that the testamentary capacity of the deceased and the *animus testandi* at the time of the alleged nuncupation should be clearly and satisfactorily proved in the case of the nuncupative will. (1 Williams on Exrs. 102; 1 Adams Ecc. R. 389, 390.)

In the present case the evidence most clearly shows that the deceased was of sound mind and memory, and I think the evidence in the case satisfactorily establishes the *animus testandi* at the time of the alleged nuncupation. He told his mate, Beckwith, to tell his wife that he loved her till the end. He was extremely sick, and undoubtedly apprehending death, and when asked if he had a will, he replied that he had not, and on being asked what disposition he wished to make of his property, he said he wished his wife to have all his personal property, and at the same time requested Beckwith to settle his affairs and see to his business. It should be borne in mind, that as well the testator as all of the witnesses present were seamen, and were undoubtedly acquainted with the rights of mariners in regard to making their wills. They evidently understood it to be a will, and spoke of it as such. And I think the *animus testandi* is satisfactorily established. The evidence is quite as strong in the case under consideration as it was in the case of Parsons v. Parsons (2 Greenleaf's R. 298, 300), where the testator was asked to whom he wished to give his property, and replied, "to my wife, that is agreed upon," and the Supreme Court of Maine sustained the will in that case. I am aware that it is said in some of the books that it is essential to a nuncupative will that an executor be named, but this is no more essential than in a written will. (Rolle's Abr. 907; How v. Goodfrey, Finch's R. 361; [Prince v. Hazleton], 20 J. R. 522.) I am inclined to think, however, that the evidence is sufficient, in the present case, to show that the testator intended to make Beckwith his executor, but it is not necessary that he should have named one.

It is not necessary to decide whether the mariner must make his will in his last sickness and *in extremis*, as was held to be the case under our former statute of wills (20 J. R. 503 [Prince v. Hazleton, 20 Johns. R. 502],) and as is required under the statutes of several of our sister States (4 Watts & Serg. 357; 4 Humph. R. 342; 3 B. Monroe's R. 162; 4 Rawle R. 46; 6 Watts

& Serg. 184; 3 Leigh. R. 140; 1 Munf. R. 466; 6 B. Monroe R. 538; 10 Yerg. R. 501; 2 Greenleaf's R. 298); for there can be no doubt upon the evidence in this case, but this will was made both *in extremis* and in the last sickness, and under circumstances which precluded the making of a written will.

I think that the *factum* of this nuncupative will is clearly established by the evidence in the case, and also the testamentary capacity of the deceased, and that the *animus testandi* at the time of the alleged nuncupation is sufficiently apparent from the evidence in the case, and that the judgment of the Supreme Court should be affirmed.

Judgment affirmed.

VIII. CONFLICT OF LAWS.

I. *Real Property.*—The *lex loci rei sitæ*, or law of the place where the land lies, governs the testator's capacity, and power to dispose of it, in the manner proposed, and the forms required for execution.[1] And so also with the construction of will devising real property,[2] though the applicability of this rule to matters of construction has been doubted.[3]

II. *Personal Property.*—The *lex domicilii*, or law of the place where testator is domiciled at the time of his death, governs the validity and construction of a will of personal property, the capacity of the testator, his power to make a will disposing of his property as proposed, and the forms required for execution.[4]

Questions of evidence are in both classes of cases determined by the *lex fori*, or law of the jurisdiction in whose courts they are raised.[5]

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[1] Randolph & T.'s note to 1 Jarman on Wills, 1, and cases cited; Chaplin on Suspension of the Power of Alienation, secs. 516–522; Story, Conflict of Laws, secs. 430, 431, 474; Wharton, Conflict of Laws, secs. 570, 575.

[2] 1 Jarman on Wills, 1; 1 Williams on Exrs. (Perkins' Am. Ed.), 429 note; Wharton, Conflict of Laws, sec. 596.

[3] 1 Jarman on Wills (Randolph & T.'s Am. Ed.), 2, note 2; Story, Conflict of Laws, sec. 479 *h*.

[4] 1 Jarman on Wills, 2; 2 Wms. on Exrs. 1088; 1 Wms. on Exrs. 366, note (n); Story, Conflict of Laws, secs. 465, 479 a; Wharton, Conflict of Laws, secs. 570, 574.

[5] Wharton, Conflict of Laws, sec. 574.

IX. MISCELLANEOUS.

Attention may here be called to a few further points within the general field of this chapter.

(*a*). *Mistake.*—In Nelson v. McDonald, 61 Hun 406, John and Jane Nelson, husband and wife, executed wills at the same time. John died, and it was then first discovered that each had by mistake signed the will prepared for the other. Jane brought a suit for reformation by changing the provisions in the husband's will to make them conform to those in the will he intended to sign. It was held that the action could not be maintained.

To the same effect is *In re* Goods of Hunt, L. R. 3 P. & D. 250.

(*b*). *Testator not dead.*—Charles James Napier was reported in the London Gazette of January 24, 1809, to have been killed in an engagement with the enemy, at Corunna in Spain. Probate of his will was granted. The report was erroneous, and subsequently he returned to England. Probate was revoked and the will was cancelled and delivery thereof to him decreed. In Goods of Napier, 1 Phillim. 83.

(*c*). On proceedings for probate, false and scandalous matter in the will may be struck out. Matter of T. B., 44 N. Y. State Reporter 304.

(*d*). A distinction is to be observed between *conditional wills* (*ante*, p. 397 *et seq.*) and wills certain parts of which are conditional. In the latter case, the will as such holds good, while the parts in question are, in accordance with ordinary principles, subject to the condition.[1]

[1] Schouler on Wills, § 285; and for a very full discussion of conditions in wills, Jarman on Wills, Index, "Conditions."

CHAPTER VI.

CONSTRUCTION, PRESUMPTIONS, AND RULES OF LAW.

THE subject of Construction of Wills covers a broad field to which entire books have been devoted.[1] For a detailed statement and discussion of the entire subject, these works may be referred to. It is the purpose of the present chapter to state the leading and more important rules, in concise form, with citations of authorities where they have been explained and applied. Special obligation in the treatment of the present subject must be acknowledged to the writers already referred to.

In the first place, then, as to *Construction* in general. There is a Law of Construction of Wills, and another Law of Construction of Deeds. The latter deals rather in hard and fast rules which are applied with great strictness and which have, accordingly, led to comparatively little litigation. The former, on the other hand, seeks, within certain limits to be hereafter explained, for the real intention of the testator, as expressed in the will. The reason for the distinction, at least in large part, seems to be that deeds have usually been drawn by persons familiar with technical language, or substantially copied from other instruments so drawn, and, also, as a usual rule, are comparatively simple in their purposes, and run along in familiar and customary ruts; while wills are so commonly drawn by laymen, and so often even by ignorant persons, and vary so enormously in their scheme, purposes, and provisions, that the courts have been obliged to accord them special treatment, and endeavor, through the mists of obscure, or inartificial, or confusing expressions, to get at the real purpose of the testator.[2] It has, however, been found, during the lapse of the centuries while our law has been growing, that even testament-

[1] Hawkins on Wills, Jarman on Wills, Vols. II., III.

[2] 2 Jarman on Wills, 837.

ary provisions, variant as they are both in purpose and in expression, do, nevertheless, group themselves in classes, and in each class certain rules have gradually grown up which attribute to given forms of expression certain *primâ facie* meanings which the courts will in any given case now take to be the real meaning *unless* a contrary intent appears from a view of the entire instrument. Hawkins defines a rule of construction, accordingly, in substance, as a rule that, if a given expression might be taken to mean either x or y (these letters representing the different meanings that might in reason be attributed to any given phrase), it shall *primâ facie* be taken to mean x (that is, a particular one of those possible meanings), unless a contrary intention appears, either expressly or by implication, from the instrument.[1]

It will thus be seen that these rules only apply where the testator might have intended either of the possible meanings; and being adopted merely to give effect to his probable intent, they yield to proof, drawn from the instrument, that he in fact did not have the presumed intention, but really intended to give his expression the other meaning. For instance, if a testator provides for his "children," it is obvious that he might have meant merely his own sons and daughters, or might have intended (as not infrequently happens) to include his grandchildren. Here the rule is that *primâ facie* the words mean only his own sons and daughters; but yet if the will shows that in fact he meant to include grandchildren within the term "children," the rule yields, and effect is given to his intention. So, also, the same word is, by another rule, held *primâ facie* to mean legitimate children. But if the instrument shows that in fact he meant to include illegitimate children, this intent prevails. The intent must be sought—except in certain cases—in the will itself, and cannot be derived from extrinsic evidence. This subject of evidence of intention will be discussed hereafter by itself.[2]

Presumptions differ from rules of construction in that they may be rebutted by extrinsic evidence. For instance, if a will is drawn with blanks for the names of legatees, and these have been filled in, there is a presumption that they were filled in before execution. But extrinsic evidence is admissible to show that in

[1] Hawkins on Wills, Preface, vii.

[2] See Index, "Evidence."

fact they were filled in after execution. So, also, if each of two testamentary instruments probated together gives a legacy of the same amount to the same person, and in each case assigns the same motive for the gift, there is a *presumption* that they are not cumulative, and that only one gift was intended,[1] and extrinsic evidence is admissible to show a contrary intent. But in the case of a mere duplicate gift, *in totidem verbis*, in two instruments, there is a rule of *construction* that *primâ facie* the legacies are cumulative.[2] While if the identical gifts are contained in the *same* instrument, there is a rule of *construction* that *primâ facie* they are not cumulative.[3] Where a will, when presented for probate, shows interlineations, or other alterations on its face, they are presumed to have been made after execution.[4] The result is that the will stands, and the changes are disregarded.[5] But if there were blanks left for names and amounts, and these have been filled in, there is a presumption that they were filled in before execution.[6] In either case, the actual facts may be shown by extrinsic evidence.

Rules of Law are fixed principles which absolutely control the meaning to be given to certain provisions, and which cannot be varied or avoided by any evidence. Thus, where a provision clearly transgresses the law against Perpetuities, it is held invalid. No evidence could make it good, because the law has expressly forbidden the thing thus provided for.

The foregoing subjects are here compared and distinguished because the peculiarities of each serve to throw into stronger contrast the essential characteristics of the others.

In proceeding now to consider the rules of Construction, it may

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[1] Hurst v. Beach, 5 Madd. 358.

[2] Dewitt v. Yates, 10 Johns. (N. Y.) 156. This being a rule of construction, only intrinsic evidence can be referred to to rebut it. Hurst v. Beach, 5 Madd. 358.

[3] Dewitt v. Yates, 10 Johns. (N. Y.) 156. Though Hawkins gives this as a rule of *construction*, he expresses hesitation in his note (p. 305), whether it may not still be, as it originally was, a mere presumption, capable of rebuttal by extrinsic as well as intrinsic evidence, instead of a strict rule of construction to be rebutted only by the terms of the instrument itself; he inclines to the latter view.

[4] 1 Jarman on Wills, 143; Schouler on Wills, 485.

[5] Doane v. Hadlock, 42 Me. 72.

[6] 1 Jarman on Wills, 144.

be added that they may best be classified in two groups, the first including the principles of general scope applicable to all cases of contruction of wills, and the second including the rules bearing on special provisions or particular phrases. Attention must here again be called to the important principle that every rule of construction aimed at determining testator's intent as between two or more possible meanings, is subject to this standing qualification, namely,—"Unless a contrary intention appears from the will." These words should be taken as forming an appendix to each rule.

RULES OF CONSTRUCTION.[1]

A. *General Principles.*

1. The great aim of the courts, in construing wills, is to arrive at the intent of the testator.

But it is important to notice that it is testator's *expressed* intention that must be sought, and not his desires which are not in fact expressed. The question is not, What did the testator in fact wish, but, What meaning did he in fact express in the provision under consideration.

2. In seeking the testator's intention, as expressed in the will, the entire instrument, including codicils[2] if any, is to be examined, and the meaning of each part determined in the light of the whole.[3]

3. Every expression is to be so construed, if practicable, as to give effect to all parts of the will, and not to nullify any.[4]

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[1] A distinction exists between Principles of Interpretation, such for instance as A, 2, *supra*, and Rules of Construction, such as B, (a), 1, *infra*. The division here adopted, however, between the principles and rules of general scope on the one hand, and those of special application in particular instances on the other, though not always sharply marked and clear cut, will, it is believed, be found on the whole more practical and convenient.

[2] Brimmer v. Sohier, 1 Cush. 118 (131-2); Ward v. Ward, 105 N. Y. 68.

[3] 2 Jarman on Wills, 840; Welsch v. Belleville etc. Bank, 94 Ill. 191; Banks v. Jones, 60 Ala. 605. A codicil constitutes a part of the will. It operates as a revocation of the preceding instrument only so far as required by its clear import. Wetmore v. Parker, 52 N. Y. 450. General terms are often restricted in meaning by the context. Webster v. Wiers, 51 Conn. 569; Timewell v. Perkins, 2 Atk. 102.

[4] Banks v. Jones, 60 Ala. 605; Rogers v. Rogers (N. J. Ch.), 23 Atl. R. 125; Hard v. Ashley, 117 N. Y. 606; Terry v. Wiggins, 47 N. Y. 512 (517).

4. The will is to be so construed, if practicable, as to avoid intestacy.[1]

5. Where the various parts of a will cannot be reconciled and rendered harmonious, the later *primâ facie* override the earlier;[2] the theory being that in such case the testator has reconsidered and reversed his first purpose. But this is a harsh rule, and only to be applied after all efforts to reconcile the provisions, and give effect to all, have failed.[3]

6. No technical terms are requisite in any part of a will.[4] But if they are employed, they are *primâ facie* to be taken in their proper technical sense.[5]

7. It is to be assumed *primâ facie* that a testator's words are to be understood in their correct and primary sense, and interpreted according to grammatical rules.[6]

8. As already explained in Chapter V. (under the head of Conflict of Laws), the construction of wills is governed, in wills of real property, by the law of the place where the land lies, and in wills of personal property by the law of testator's domicil at the time of his death.[7]

9. A will does not go into effect until the death of a testator. This rule inheres in the very nature of a will. But it may, as the saying is, *speak* either as of the date of execution or as of the date of testator's death, or some other date. That is to say, references in the will, such as to classes of beneficiaries, or to testator's property, designated or described in general terms, might be intended by him, on the one hand, to refer to the persons or property answering to the description at the time of execution, or, on the

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[1] Vernon v. Vernon, 53 N. Y. 351 (361); Toms v. Williams, 41 Mich. 552 (566).

[2] 2 Jarman on Wills, 840; Van Nostrand v. Moore, 52 N. Y. 12 (20); Murfitt v. Jessop, 94 Ill. 158; Hemphill v. Moody, 62 Ala. 510 (513).

[3] Harrison v. Jewell, 2 Dem. 37; Trustees v. Kellogg, 16 N. Y. 83 (88); Rogers v. Rogers (N. J. Ch.), 23 Atl. Rep. 125.

[4] Bliven v. Seymour, 88 N. Y. 469 (476).

[5] Keteltas v. Keteltas, 72 N. Y. 312; Clark v. Smith, 49 Md. 106 (117). But this is in many cases readily rebutted, Kelly v. Reynolds, 89 Mich. 464.

[6] 2 Jarman on Wills, 842.

[7] 2 Jarman on Wills, 840. For a certain divergence of statement among the authorities, see *ante*, p. 436.

other hand, to refer to such persons or property as might answer to the description at some later period. Of course the testator may use terms definite enough to show clearly which he means, as for example by referring to "the house I am now possessed of," or by designating the beneficiaries by name; but we are at present looking for a rule of construction which shall determine the *primâ facie* meaning where the expression is fairly open to either explanation.

At common law, then, a devise of testator's real property in general terms, spoke only from the date of the will, as covering all that testator then had under his control,[1] and even though testator's clearly expressed wish was to include after acquired lands.[2] But general testamentary gifts of all testator's personal property, or all the residue thereof, spoke *primâ facie* from the date of testator's death.[3]

Under the statute of 1 Vict. ch. 26, sec. 24, descriptions of real *or* personal estate, the subject of gift, refer to and comprise the property answering to the description at the death of the testator.

In our States, statutes have generally been adopted on this subject, which vary somewhat in their effect. Sometimes it is provided that all the land possessed by testator at his death shall *primâ facie* pass under a general devise of all his land; and sometimes, that it shall be *construed* so to pass; sometimes it is provided that after acquired land shall *primâ facie* pass under a devise of all real estate, if the will in terms denotes an intention to that effect, while sometimes the law is that a general devise of real estate shall pass after acquired land *unless* an intent appear to the contrary, and still elsewhere the statute merely confers the *power* to dispose by will of after acquired real estate. There are also other distinctions. The general modern rule, however, like that relating to personal property, is that a general gift of all testator's real estate carries *primâ facie* all of which he is possessed at death. The general provisions of the respective statutes, as construed by the courts of their jurisdictions, must be consulted in each case.[4]

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[1] Hawkins on Wills, 14; Jarman on Wills, Chap. x.; see *In re* Dickerson (Conn.), 10 Atl. Rep. 194.

[2] 1 Wms. on Exrs. 220; *In re* Dickerson (Conn.), 10 Atl. Rep. 194.

[3] Hawkins on Wills, 17.

[4] For a classification and explanation of the various statutes, see 1 Jarman on

A further question has often arisen under these statutes concerning their effect on wills executed before their passage. Under the varying phraseology of the various enactments, the decisions of different States have led to opposite conclusions.[1]

It will be noticed that these statutes refer to the subject matter of the testamentary provisions, and not to the persons who, by general description, are to be entitled to receive them.[2] As to them, the old rule still prevails that in the absence of a contrary intent shown in the will, gifts to classes, as to "children" or "descendants," refer to those who may compose the class at the date of testator's death.[3]

It will also be noticed that the rule that a will speaks as of the date of testator's death does not refer to the question of its *validity*. For unless it is a valid will when made, subsequent events, other than a formal execution by a competent testator, cannot render it valid.[4]

But even under the new laws, by virtue of principles already discussed, if testator makes it clear, on the whole will, that he means to refer only to property possessed by him at the date of the will, as, for instance, where he makes it clear by the terms employed, that he refers exclusively to property then owned by him; so where he devises "the house now occupied by me," or bequeaths "my brown horse," or devises "that freehold which I purchased of Mr. B.," after acquired houses, horses, or freeholds cannot pass.[5]

10. Testator's heirs can be disinherited only by express devise or necessary implication.[6]

11. In order to deprive an heir or distributee of his share, testator must by will give the property to some one else. An instrument devoted exclusively to providing that an heir shall take

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Wills (Randolph & T.'s Am. Ed.), 326, note 3; Hawkins on Wills (Sword's Am. Ed.), 18, note; 1 Wms. on Exrs. 220.

[1] 1 Jarman on Wills (Randolph & T.'s Am. Ed.), 326, notes 3 and 4.

[2] 1 Jarman on Wills, 337. [3] 1 Jarman on Wills, 326, 337.

[4] 1 Wms. on Exrs. 222; 1 Jarman on Wills (4th London Ed., Randolph & T.'s Am. Ed.), 337.

[5] Hawkins on Wills, 20.

[6] 2 Jarman on Wills, 840; 1 Id. 582; Gelston v. Shields, 78 N. Y. 275.

nothing, and not containing affirmative dispositions to others, does not effect the purpose.[1]

12. Where there are express provisions, implications, such as that embodied in the preceding rule, and arising from mere weight of probability, are not to be indulged.[2]

13. Where there are express and clear provisions, they are given effect in spite of inadequate reasons assigned for them, or of erroneous references to them in other parts of the will. Nor will they be controlled by the fact that they are inconvenient, or absurd (if lawful), or that the consequences were probably unforeseen.[3]

14. Where words occur more than once in a will, they are to be taken, *primâ facie*, as bearing the same meaning throughout, and so, if different words are used where, if the intent was the same, the same word would naturally have been employed, they are taken, *primâ facie*, to represent a different intent.[4]

15. Testator will *primâ facie* be assumed to intend that his proposed dispositions shall take effect. Therefore, among other consequences of this rule, the court will give to an expression, capable of either rendering, a literal or a freer meaning, according to which would make the gift valid and which invalid.[5]

Having thus stated the general rules of construction, attention may further be again called to the controlling effect of testator's intention as expressed in the terms of the will taken as a whole. If this intent cannot operate in full, it is given all practicable effect. And in giving force to it, as disclosed, the court may, where the necessity is obvious, transpose, correct, supply, or reject words and limitations, in order to bring them into manifest harmony with testator's expressed purposes.[6]

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[1] 2 Jarman on Wills, 840; Coffman v. Coffman, 85 Va. 459.
[2] Wetter v. Walker, 62 Ga. 142; 2 Jarman on Wills, 841.
[3] 2 Jarman on Wills, 841.
[4] 2 Jarman on Wills, 842; but see the notes there given.
[5] 2 Jarman on Wills, 842.
[6] 2 Jarman on Wills, 842, 843; Roe v. Vingut, 117 N. Y. 204.

B. *Special Rules.*

(*a*). *Provisions concerning land.*

1. "Land," or "real estate," *primâ facie* includes reversionary interests in land.[1]

2. Where testator has contracted to purchase land, and has not yet received title, a general devise of "land" or "real estate" *primâ facie* includes his rights under such contract.[2]

3. By the old law a general devise to A merely, without some words of perpetuity, carried only a life estate.[3] But now, by virtue of statutes generally adopted in England and our States, such a devise *primâ facie* gives a fee.[4]

4. By the old law a devise to A for life, "remainder to his heirs," or "to the heirs of his body," gave A the fee, or the fee tail, as the case might be.[5] But if testator sufficiently explained the meaning he attached to the term "heirs of the body," as used to designate some other class than those understood by the law, they might take the remainder.[6] This rule has been abolished in many of our States by statute.[7]

5. "Estate," which was sometimes formerly held to mean, *primâ facie*, *personal* property, now, *primâ facie* includes both real and personal property.[8]

6. "Rents and profits," by devise, *primâ facie* carries the land itself.[9]

7. "Use and occupation," employed in a devise, does not re-

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[1] Hawkins on Wills, 33.

[2] Collison v. Girling, 4 My. & Cr. 63 (75). As to lands which testator has contracted to *sell*, see 1 Jarman on Wills, 703 *et seq.*

[3] 1 Blackst. Comm. 107, 108.

[4] For a list of statutes, see Hawkins on Wills (Swords' Am. ed.), 139.

[5] 1 Blackst. Comm. 242; 2 Jarman on Wills, 332.

[6] 2 Jarman on Wills, 333–4; Hawkins on Wills, 186.

[7] For a classification and consideration of these statutes, see Jarman on Wills (Randolph & T.'s Am. Ed.), ch. 36, note 1; Hawkins on Wills (Swords' Am. ed.), 184, note.

[8] Hunt v. Hunt, 4 Gray 190; Hawkins on Wills, 53; Smith v. Smith, 17 Gratt. 268 (276); see Birdsall v. Applegate, Spenc. (N. J.) 245.

[9] Earl v. Rowe, 35 Me. 414 (419); Smith v. Dunwoody, 19 Ga. 237 (256); Monarque v. Monarque, 80 N. Y. 320 (324).

quire personal occupation by the devisee himself. He takes title free from such condition.[1]

8. Where testator devises land to A in fee, and in case of his death under 21 (or other specified age), *or* without issue then over, "or" will *primâ facie* be taken to mean "and."[2]

9. Under the common law, where a testator used the phrase "death of A without issue," it was held to refer *primâ facie* to the death of A, and the failure of his issue at any time whatever, however remote.[3] The same rule applied where the phrase is "without leaving issue."[4]

The rule applies, where the phrase is "die without issue," to both real and personal property.[5] But where the phrase is "die without leaving issue," it applies only to real property, while in case of personal property it is held *primâ facie* to mean "die without leaving any then surviving issue."[6]

The meaning of the foregoing rule is expressed in the phrase, "indefinite failure of issue." By the present English Wills Act this rule is reversed, and the expressions, "die without issue," "die without having issue," "die without leaving issue," and any other equivalent words, refer, *primâ facie*, to a failure of issue *at the death* of the person whose issue are spoken of. And similar statutes have been very generally, though not universally, adopted by our States.[7]

10. *Estates tail.*—There are numerous rules of construction relating to estates tail, which may be found fully stated and discussed in the text-books already referred to. A large number of American statutes have expressly converted estates tail into es-

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[1] Hawkins on Wills, 119.

[2] Roome v. Phillips, 24 N. Y. 469; Burton v. Conigland, 82 N. C. 99; Kendig v. Smith, 89 Ill. 300.

[3] Beauclerk v. Dormer, 2 Atk. 313; Hall v. Chaffee, 14 N. H. 215 (219).

[4] Hawley v. Northampton, 8 Mass. 38; Chetwood v. Winston, 40 N. J. L. 337.

[5] Hawkins on Wills, 206; Usilton v. Usilton, 3 Md. Ch. 36.

[6] Usilton v. Usilton, 3 Md. Ch. 36; Flinn v. Davis, 18 Ala. 132; Hawley v. Northampton, 8 Mass. 38.

[7] For a list of these States, with references to their statutes, see Hawkins on Wills (Swords' Am. ed.), 214, note 1.

tates in fee simple; many others have abolished estates tail; still others have converted them into life estates with remainders in fee simple; while in others, similar results have been indirectly accomplished by other statutes, or have been effected by the decisions of the courts. The subject is not one, therefore, of sufficient practical interest to warrant discussion here. The particular laws of the several States should be carefully examined.[1]

11. *Vesting.*—This is a subject properly belonging to the general field of real estate law. For a detailed discussion, reference should be made to Fearne on Contingent Remainders; Washburne on Real Property; Williams on Real Property; 1 Jarman on Wills, Chap. xxv., and other standard treatises. A statement and discussion of the leading principles may be found in Chaplin on Suspension of the Power of Alienation, §§ 4–60, and the authorities there cited.

12. *Widow's dower.*—The former English rule was that a devise to testator's widow, of a part of the lands liable to her dower, was *primâ facie* held to be a gift in addition to dower.[2] By the statute of 3 and 4 Will. IV., c. 105, this rule was reversed, and the gift is taken, *primâ facie*, to be in lieu of dower. Most of our States have adopted similar statutes, and in some of them any provision for the wife in the will is taken, *primâ facie*, to be in lieu of dower.[3] But sometimes the old rule still holds, and a widow is not put to her election between dower and the provision for her in the will, unless the two are strictly inconsistent.[4]

(*b*). *Provisions concerning personal property.*

1. "Money" does not, *primâ facie*, include promissory notes, stock, etc. But it does, *primâ facie*, include money on deposit in bank subject to check.[5]

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[1] For a list of these statutes, with references, see 2 Jarman on Wills, 824 (Randolph & T.'s Am. ed., note 1).

[2] Hawkins on Wills, 278.

[3] For a summary of these statutes, see 1 Jarman on Wills (Randolph & T.'s Am. ed.), 458, note 14; Scribner on Dower, Ch. xvi.

[4] Konvalinka v. Schlegel, 104 N. Y. 125.

[5] Beatty v. Labor, 2 McCart. 110.

2. "Ready money" *primâ facie* includes cash on deposit in bank subject to check.[1]

3. A gift of "money remaining" after payment of debts, *primâ facie* carries, in the absence of a general residuary bequest, the entire residuary personal estate.[2]

4. "All my goods," or "goods and chattels," *primâ facie*, carries the whole personal estate.[3]

5. "Legacies" *primâ facie* includes annuities.[4]

6. "Debts" *primâ facie* carries money in bank on general deposit.[5]

7. "All my effects" *primâ facie* carries the entire personal estate,[6] and does not cover real property.[7]

8. "Income," if given without time limit, *primâ facie* carries the principal.[8]

9. Annuity. The creation of a mere annuity, by bequest, *primâ facie* is for the life of the annuitant.[9]

10. *Vesting.*—The meaning of this term, as applied to personal property, is discussed in Hawkins on Wills, 223 *et seq.*; Williams on Executors (Perkins' Am. Ed., 1325 *et seq.*, notes), 1224 *et seq.*; Williams on Personal Property; 1 Jarman on Wills, Chap. xxv., and Chaplin on Suspension of the Power of Alienation, § 388 *et seq.* In general, it may be here said that where a legacy is given of which the enjoyment is postponed, the leading inquiry upon which the question of vesting or not vesting turns, is, whether the gift itself is immediate, and only the time of enjoyment postponed, or is future, depending as a condition precedent upon the arrival of the beneficiary at a given age, or surviving some other person, or the like.[10] In other words, if the

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[1] See Smith v. Burch, 92 N. Y. 228.

[2] Smith v. Davis, 1 Grant's Cas. (Penn.) 158; Paul v. Ball, 31 Tex. 10.

[3] See Stuckey v. Stuckey, 1 Hill Ch. (S. C.) 308 (309).

[4] Smith v. Fellows, 131 Mass. 20.

[5] Carr v. Carr, 1 Mer. 541 n.

[6] Hawkins on Wills, 55.

[7] Hawkins on Wills, 55.

[8] Gulick v. Gulick, 27 N. J. Eq. 498.

[9] Bates v. Barry, 125 Mass. 83.

[10] Chaplin on Suspension of the Power of Alienation, § 388 *et seq.*, and cases cited.

gift, and the *direction as to payment*, are distinct, the postponement of payment does not *primâ facie* postpone the vesting of the gift.[1]

And further, if the payment of a gift be postponed, but the whole income in the meantime is given to the same beneficiary, *primâ facie* the gift is vested.[2] The same rule applies where the postponement of payment, or division, is for the convenience of the estate, or to let in some other interest.[3] As a general proposition, the law favors vesting.[4]

11. A legacy of stock, not specifying any particular shares, is *primâ facie* a general and not a specific legacy.[5] But if the intent appears to give certain particular stock, as "*my* stock in the 3 per cents," etc., it is specific.[6]

NOTE.

For a full treatment of the force and extent of *particular words* of description of property, see Jarman on Wills, Chap. 22, 23, and 24; Hawkins on Wills, Chap. 5; Wms. on Exrs., 1272 *et seq.*

Terms descriptive of *beneficiaries*, Hawkins on Wills, Chap. 8 and 15; Jarman on Wills, Chap. 29, 30, and 31; Williams on Executors, 1089 *et seq.*

(*c*). *Lapsed devises and legacies.*

At the common law, where a gift of real or personal property was made by will, and the devisee or legatee died during the lifetime of the testator, the gift failed, or, as the saying was, "lapsed."[7] A declaration by testator in the will that such should

[1] Hawkins on Wills, 236; Kimball v. Crocker, 53 Me. 267; Teele v. Hathaway, 129 Mass. 164; Bushnell v. Carpenter, 92 N. Y. 270; Cox v. M'Kinney, 32 Ala. 462.

[2] Newberry v. Hinman, 49 Conn. 180; Provenchere's Appeal, 67 Penn. St. 466; Everett v. Mount, 22 Ga. 328.

[3] Kimball v. Tilton, 118 Mass. 311; Robert v. Corning, 89 N. Y. 225; Tayloe v. Mosher, 29 Md. 443.

[4] Tayloe v. Mosher, 29 Md. 443 (457).

[5] Pearce v. Billings, 10 R. I. 102. For the meaning of these terms, see Definitions, *post*.

[6] Brainard v. Cowdrey, 16 Conn. 1; Blackstone v. Blackstone, 3 Watts 335.

[7] A general review of the law on the subject of lapse will be found in 1 Jarman on Wills, Ch. XI.

not be the result, did not change the rule, unless he provided for a gift over in case of death. And the question of whether, in given cases, sufficient provision has been made to prevent the failure of the gift, or rather to carry it out in favor of the first donee's heirs, or representatives as substituted beneficiaries, has given field for many minor rules of construction. If the gift were originally to joint tenants, the death of one would, on familiar grounds, cause no lapse; but if to tenants in common, upon the death of one there was of course no survivorship as to his share. So also if the gift were to a class, to be ascertained at testator's death or later, the death of any member of the class, during testator's life, would not, of course, cause any lapse.

Where land was devised subject to a money charge, the death of the devisee before testator did not vitiate the charge.[1]

The question of the destination, under such a testamentary provision, of the legacy thus charged, in case it is the legatee who dies before testator, is said by Jarman not to have been settled by authority, but he discusses the subject at length.[2]

By the modern English Statute of Wills, the destination of lapsed devises has been provided for, as will be stated hereafter under subdivision (*d*). The same rule has been adopted in some of our States.[3] It also provides in substance that where a bequest or devise—for any estate or interest not determinable at or before the death of the donee—shall be given to a child or other issue of the testator, and such child or issue shall die in testator's lifetime, leaving issue, and any such latter issue shall be living at testator's death, the devise or bequest shall *primâ facie* not lapse, but shall take effect as if the death had occurred immediately after that of testator. This provision has been followed in the statutes of many of our States.[4] And in some instances these statutes expressly prevent lapse in all cases whatever.[5]

(*d*). *Residuary devises and bequests.*

1. *Devises.*—By the early law a general residuary devise did not cover a specific devise which lapsed. But this rule has now

[1] Wigg v. Wigg, 1 Atk. 382; Oke v. Smith, 1 Ves. Sr. 185.

[2] 1 Jarman on Wills, 347.

[3] Randolph & T.'s note 8, to 1 Jarman on Wills, 351.

[4] For list of statutes, see Randolph & T.'s note 9, to 1 Jarman on Wills, 352.

[5] Hawkins on Wills, 68 Swords' Am. note 2.

been reversed in England, by 1 Vict., ch. 26. In this country the rule varies in the several jurisdictions.[1]

2. *Bequests.*—A general residuary bequest covers lapsed and void legacies.[2]

(*e*). *Tenancy.*

1. Where there was a devise or bequest to several, as "to A, B, and C," or to a class, *primâ facie* they took, under the earlier law, as joint tenants, and not as tenants in common.[3] In some of our States this rule has been reversed by statute, and such provisions are *primâ facie* taken to create a tenancy in common. Some of these statutes apply only to devises, some to both devises and bequests, and in one (New York), the new statutory rule, which does not in terms cover all bequests, has been given a wide scope, and is apparently applied by analogy to all testamentary dispositions of personal property.[4]

(*f*). *Provisions employing terms of relationship.*

The following *primâ facie* meanings are given to the following terms:

1. "Children" means legitimate children. It also means children as opposed to grandchildren. The same principles are applied to all terms of relationship.[5]

2. "Brothers" and "sisters" include half-brothers and sisters.[6]

3. "Issue" *primâ facie* includes all descendants. But if reference is also made to their "parent," the term means "children."[7]

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[1] Hawkins on Wills, 44, 45; and for the American statutes, Jarman on Wills (Randolph and T.'s Am. Ed.), vol. 3, p. 798, note 26.

[2] Drew v. Wakefield, 54 Me. 291 (296); Prescott v. Prescott, 3 Met. 141. For a general discussion of residuary bequests and lapsed legacies, see Wms. on Exrs. 1454 *et seq.*; Randolph and T.'s Am. Ed. of Jarman on Wills, vol. 3, p. 798 *et seq.*; Hawkins on Wills, Ch. 10.

[3] For explanation of these terms, see 2 Blackst. Comm., Ch. xii.; and for the rule, Hawkins on Wills, Chap. x.; and for a general discussion, Jarman on Wills, Ch. 32.

[4] For a classification of the various American statutes, see Hawkins on Wills (Swords' Am. ed.), 111, note. For the scope of the New York rule, see Chaplin on Suspension of the Power of Alienation, § 187 *et seq.*

[5] Hughes v. Knowlton, 37 Conn. 429; Appel v. Byers, 98 Penn. St. 479. For qualifications and exceptions to the rule see Hawkins on Wills, 80.

[6] Hawkins on Wills, 86.

[7] Id. 87.

4. The "family" of a person, *primâ facie* refers to his children only.[1]

5. "Relations," *primâ facie* refers only to those who would be entitled under the local Statute of Distribution.[2]

6. "Representatives," *primâ facie* refers to executors or administrators, and not to relatives.[3]

7. "Heirs." In our States the general rule is that if personal property is given to "heirs," the word will *primâ facie* be taken to mean those who would take under the Statute of Distribution.[4] While in case of devises of real property the term is of course used in its ordinary sense.

8. "Next of kin," applying to devisees or legatees, refers, *primâ facie*, not to those entitled to take under the Statute of Distribution, but to the nearest blood-relations, in equal degree, of the person whose "next of kin" they are.[5] But "next of kin according to the statute," refers to the persons entitled under the local Statute of Distribution.[6] In both cases, the phrase refers to those who are next of kin at the time of death of the person whose next of kin they are.[7]

9. Where testator provides a gift in general for *children*, either his own or those of another, and in stating the number of them names a number less than there really are at the date of the will, *primâ facie* this is an error, and all then in being take.[8]

The rule is the same where the gift is to brothers, sisters, grandchildren, or servants.[9]

10. Where testator gives property to *children*, either his own

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[1] Heck v. Clippinger, 5 Penn. St. 385.

[2] Varrell v. Wendell, 20 N. H. 431 (435); McNeiledge v. Barclay, 11 S. & R. 108.

[3] Halsey v. Paterson, 37 N. J. Eq. 445.

[4] Ferguson v. Stewart, 14 Ohio 140; Houghton v. Kendall, 7 All. 72 (76); Nelson v. Blue, 63 N. C. 659 (660).

[5] 2 Jarman on Wills (5th Eng. ed.; Randolph & T.'s Am. ed.) 107; Redmond v. Burroughs, 63 N. C. 242 (245).

[6] Hawkins on Wills, 97. [7] Brent v. Washington, 18 Gratt. 526 (585).

[8] Urie v. Irvine, 21 Penn. St. 312; Thompson v. Young, 25 Md. 450 (459); Cleveland v. Carson, 37 N. J. Eq. 378.

[9] Hawkins on Wills, 62, 63, citing English cases.

or those of another, this mere term *primâ facie* means those in being at the *death* of the testator.[1]

The same rule applies to grandchildren, issue, brothers, nephews, and cousins.[2]

It does not apply where specific persons are pointed out.[3] Nor where the number is stated, either correctly or incorrectly.[4]

11. Where testator gives a corpus generally to children as a class, whether his own or those of another, and the gift is *future* and not present, there the interest therein vests, according to its nature, but subject to open and let in future-born members of the class until the time for distribution.[5]

The rule applies to grandchildren, issue, brothers, nephews, and cousins.[6]

12. Where, however, each member of the class of children is to receive his share at a different time, as, upon reaching majority, or upon marriage, here the period for opening and letting in new members ends when the first of the class becomes entitled to his share.[7]

13. Children *in ventre sa mere* are regarded as in existence, to satisfy the terms of a gift to children "born" or "living" at a given time.[8]

14. Where testator makes a devise or bequest to the children of two or more persons,[9] or one or more persons and the

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[1] Downing v. Marshall, 23 N. Y. 373; Shotts v. Poe, 47 Md. 513; Wood v. McGuire, 15 Ga. 202.

[2] Hawkins on Wills, 68, citing English cases.

[3] Hawkins on Wills, 69.

[4] See preceding rule. For a discussion of further qualifications, or distinctions, under this rule, see Hawkins on Wills, 69 *et seq.*

[5] Ward v. Tomkins, 30 N. J. Eq. 3; Barnum v. Barnum, 42 Md. 251; Moore v. Dimond, 5 R. I. 121 (129).

[6] Hawkins on Wills, 72.

[7] Tucker v. Bishop, 16 N. Y. 404; Hubbard v. Lloyd, 6 Cush. 522.

[8] Hall v. Hancock, 15 Pick. 255 (258); Groce v. Rittenberry, 14 Ga. 232.

[9] Farmer v. Kimball, 46 N. H. 439; Hill v. Bowers, 120 Mass. 135; Verplanck's Will, 91 N. Y. 439; Walters v. Crutcher, 15 B. Monr. 10. For an illustration of a contrary result due to contrary intent, see Vincent v. Newhouse, 83 N. Y. 505.

children of another or others,[1] as tenants in common, here the beneficiaries *primâ facie* take *per capita* and not *per stirpes*.

15. Where testator devises land to B, on failure of the *heirs* of A, and B is himself capable of being an heir of A, the word heirs will be taken to mean *heirs of the body*, in order to give effect to the devise to B.[2]

(*g*). *Execution of Powers.*

1. By the earlier law, where the testator was the donee of a general power over property, which he might exercise by will, general devises and bequests by him did not, *primâ facie*, apply to the property over which he had the power.[3] But now by the statute of 1 Vict., ch. 26, § 27, this rule is reversed, and *primâ facie* a general testamentary disposition of property sufficient in terms to cover that in question, is deemed to be an execution of the power unless a contrary intent appears. And similar statutes have been adopted in many of our States.[4]

2. Where testator gives real or personal property, and designates either a class, or a number of beneficiaries, leaving it to a designated person to choose the particular ones from the class or number who shall receive the gift, or to designate the proportions in which they shall receive it, here, if there is in fact no exercise of the power, all the members of the class, or all the persons named, take the gift in equal shares.[5]

(*h*). *Trusts.*

1. A devise to a trustee on an active trust to pay the rents and profits to a beneficiary, gives the trustee the legal title.[6] But if

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[1] Brittain v. Carson, 46 Md. 186; Macknet v. Macknet, 24 N. J. Eq. 277.

[2] Hardy v. Wilcox, 58 Md. 180; Goodell v. Hibbard, 32 Mich. 47; Williams v. McCall, 12 Conn. 328.

[3] Burleigh v. Clough, 52 N. H. 267; Johnson v. Stanton, 30 Conn. 303; Mory v. Mitchell, 18 Md. 241.

[4] For a list of these States, see 2 Jarman on Wills (Randolph & T.'s Am. Ed.), 862, note 28; 1 N. Y. R. S. 737, § 126; Bangs v. Smith, 98 Mass. 278.

[5] Varrell v. Wendell, 20 N. H. 431; Bull v. Bull, 8 Conn. 47. For a general discussion of the execution of powers by will, see Hawkins on Wills, Ch. 2; 1 Jarman on Wills, 676, and note 5 Randolph & T.'s Am. Ed.

[6] Sparhawk v. Cloon, 125 Mass. 263; Ware v. Richardson, 3 Md. 506.

the trust is passive, and directs the trustee to permit the beneficiary to receive the rents and profits, here the beneficiary takes the legal title.[1] The laws concerning uses and trusts are not uniform throughout our States, and this rule varies accordingly. But in New York, where the statutes have very greatly changed the law of trusts, the same substantial distinction exists. For a trust to receive and apply, or pay over, the rents and profits, gives the trustee the legal title. While trusts not permitted, where the general result aimed at is not unlawful, vest the title in the proposed beneficiary, subject, in appropriate cases, to a *power* in the proposed trustee.[2]

2. A trustee takes by devise only the title necessary for the performance of the trust.[3]

3. *Precatory words.*—Where a testator makes a devise or bequest, and expresses a desire concerning the particular application of it, *primâ facie* this creates an obligatory trust in some States,[4] but in other States the mere expression of a desire is *primâ facie* merely a wish expressed to the beneficiary, and not obligatory.[5]

The following illustrations of precatory words are given by Hawkins:[6] I recommend; It is my dying request; It is my absolute desire; I entreat; I advise; In full confidence that, etc.; Trusting that, etc.; Not doubting that, etc.; Well knowing that, etc.; Hoping that, etc. All these may be controlled by the context, as, also, may even the express words "in trust."[7] Thus, even where precatory words are *primâ facie* obligatory, a gift to A, "not doubting but that she will dispose of *what shall be left* at her death to our two grandchildren," would be held a mere suggestion.[8]

4. In jurisdictions where a trustee can in fact devise the legal

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[1] Hawkins on Wills, 140.

[2] Chaplin on the Suspension of the Power of Alienation, § 250, § 145.

[3] Hawkins on Wills, 143.

[4] For instance, Cole v. Littlefield, 35 Me. 445; Warner v. Bates, 98 Mass. 274; Ingram v. Fraley, 29 Ga. 553.

[5] For instance, Gilbert v. Chapin, 19 Conn. 346; Batchelor v. Macon, 69 N. C. 545; Burt v. Herron, 66 Penn. St. 400 (402); Lawrence v. Cooke, 104 N. Y. 632; Campbell v. Beaumont, 91 N. Y. 464.

[6] Hawkins on Wills, 160 *et seq.*

[7] Freedley's Appeal, 60 Penn. St. 344.

[8] Wynne v. Hawkins, 1 Bro. C. C. 179.

title to property held by him in trust, a general devise of "land" or "real estate," *primâ facie*, includes land so held in trust.[1]

(*i*). *Substitution and Survivorship.*

1. In England, the rule is that where there is a gift of personalty, with words of survivorship, the latter refer *primâ facie* to the period of payment or distribution, and not to that of testator's death.[2] The true rule as applied to realty is in doubt.[3]

In this country the decisions on the rule itself are conflicting.[4]

2. Where there is a gift of a legacy or share to a legatee, and over in case of his death under certain circumstances, here, if the event happens during testator's life, the gift over takes effect.[5]

3. In a bequest to one, and over, in case of his death, to another, the reference to the death of the first named means *primâ facie* his death before the time for payment or distribution.[6]

4. Where there is a gift to several legatees or devisees, and on certain contingencies the respective shares are to accrue to the other takers, here, *primâ facie*, each given share can go over but once, and thereupon becomes freed from the provision concerning accruer.[7]

(*j*). *Equitable Conversion.*

In determining whether a given scheme of disposition deals with real or personal property, the mere fact of the actual form it wears at testator's death is not decisive. It is here that the doctrine of equitable conversion becomes important.[8]

Where there is an imperative direction to sell, here equity, on the principle of regarding that as done which ought to be done,

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[1] Hawkins on Wills, 85; as to the remedy of the *cestui que trust*, see 1 Jarman on Wills, 698.

[2] Hawkins on Wills, 261. [3] Id. 262.

[4] Hill v. Bank, 45 N. H. 270; Hughes v. Hughes, 12 B. Mon. 115; Martin v. Kirby, 11 Gratt. 67; Ross v. Drake, 37 Penn. St. 373.

[5] Goddard v. May, 109 Mass. 468.

[6] Sims v. Conger, 39 Miss. 234; Briggs v. Shaw, 9 All. 517.

[7] Everitt v. Everitt, 29 N. Y. 39; Hutchinson's Appeal, 34 Conn. 300; Chaplin on Suspension of the Power of Alienation, § 184.

[8] A summary of the leading principles concerning Equitable Conversion may be found in Chaplin on Suspension of the Power of Alienation, §§ 470–478.

considers the conversion as effected at the time when a sale ought to take place, whether the land is really sold then or not.

Although, consistently with equitable conversion, a discretion may be reposed in the person directed to sell, concerning the *time* when the sale shall be made, yet a mere discretionary power of sale does not effect equitable conversion. A direction to sell may be implied from the instrument, and need not be expressed in so many words. It may be gathered from the entire instrument.

The accompanying rules of construction upon this subject are to the effect that provisions calling peremptorily for a sale either at a fixed time, or at a time to be determined by the person having the power of sale, shall *primâ facie* effect a conversion unless it appear that such was not in reality the intent of testator in using the given expressions, or that it was his intent only for certain purposes which are shown to have failed.

EXTRINSIC EVIDENCE ON CONSTRUCTION.

We have just seen that there are certain principles of a sweeping character, in the light of which the courts set forth in their search for testator's intention. To this class, for example, belongs the rule that in looking for the meaning of a given phrase all parts of the entire will should be considered together. Such rules as properly belong to this class are not subject to the qualification "unless a contrary intent appear." It is not their office to attribute a given meaning to a given phrase, but merely to point out, so to speak, the spirit in which the search for the intent should be pursued. We have also noticed that there are other rules, comprising some of those given under the head of "General Principles" and all those under the head of "Special Rules," which point out the *primâ facie* meaning to be attributed either to broad classes of provisions, if they are general, or, if they are special, to particular terms, phrases, and provisions. Now all these rules which attribute a *primâ facie* meaning, are intended merely as so many convenient means of reaching testator's intent, and if, in accordance with legal principles, the intent can be shown to be contrary to that suggested by the rule, the rule, of course, yields.

Now the evidence that might have a logical bearing on such questions might be either such as is offered by the will itself, or such as is brought in from outside. The former, called intrinsic evidence, is always admissible. The admissibility of the latter, called extrinsic evidence, is now to be considered.

The first, and sweeping rule on this point, is, that (subject to certain exceptions) the provisions of every will must be construed in the light of the evidence supplied on the face of the will itself only. This is an obvious and natural corollary of the general principle embodied in the statutes of wills by which, for the sake of safety, precision, and certainty, all wills,—except nuncupative wills,—are required to be put *in writing* by the testator. It is clear that if free permission should be given to offer outside evidence of what testator really meant to say, in order to qualify, contradict, alter, or supplement what he in fact has said, the advantages derived from the requirement that he must put his wishes in writing, in a duly executed instrument, would be to a great extent lost.

Extrinsic evidence is, however, perforce admitted for certain purposes and to some extent. As there are, to begin with, certain classes of such evidence, the admissibility of which is too obvious to call for extended comment, it will be well to state them first before taking up the more difficult cases.

First, then, if the characters in which a will is written are difficult to decipher, or the language is foreign, extrinsic evidence for such purposes is of course admissible.[1] So if testator, though not a foreigner employing a foreign language, lived in a district where certain terms employed in the will were, as a matter of general local usage, given a meaning different from their ordinary sense at large, the *fact* that such usage did exist may be shown by extrinsic evidence, unless the will indicates that testator did use them in their ordinary sense.[2] So, further, if testator has employed peculiar names, or nicknames, for persons or things, extrinsic evi-

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[1] Wigram on Wills, Prop. IV.: 1 Jarman on Wills, 421; Caulfield v. Sullivan, 85 N. Y. 153.

[2] 1 Jarman on Wills (4th London ed., Randolph & T.'s Am. ed.), 421. And technical terms may also be explained, or, so to speak, translated. 2 Parsons on Contracts, 561.

dence may be offered to identify the person or thing intended.[1] And so where testator mentions specific property or persons by descriptive terms, as, "the house I live in,"[2] or "the farm I bought from A," or "my farm called Trogue's Farm,"[3] extrinsic evidence is of course admissible to show what house he did then live in, what farm he did buy from A, and what farm was called Trogue's Farm. And, in general, extrinsic evidence of all material facts relating to the identity of the person claiming or property claimed may be introduced for the purpose of identification.[4]

But although it is thus allowable to offer extrinsic evidence of facts, to identify the person or thing described in the will, such evidence is not admissible to show that testator, in using a term applicable to existing persons or things, meant it to also cover something else not in fact included in the phrase used. Thus, though, as in the instance just given, extrinsic evidence may be admitted to show what farm was "called Trogue's," or what estate was meant by the description "my estate called Ashford Hall,"[5] yet where testator devised his "estate of Ashton, in the county of Devon," extrinsic evidence that testator was accustomed to include under the name of the "Ashton estate," property in contiguous parishes other than Ashton, was excluded, the word "of" being taken in the sense of "in," or "at."[6] If he had said "my so-called Ashton estate," it might have been shown that the estate "so called" included property not in Ashton.[7]

Having thus disposed of these obvious classes of admissible extrinsic evidence, we come now to cases where words, phrases, or provisions are found in the will, the meaning of which is disputed on account of different views of testator's intent in using them. In proceeding to consider the admissibility of extrinsic evidence in such cases, we must first notice that if the terms used are sensible with reference to extrinsic circumstances, when taken in their

[1] Per Lord Abinger, in Hiscocks v. Hiscocks, 5 M. & W. 368.
[2] Doe d. Clements v. Collins, 2 T. R. 498.
[3] Goodtitle v. Southern, 1 M. & Sel. 299.
[4] Wigram on Wills, Prop. V.; see Hiscocks v. Hiscocks, 5 M. & W. 368.
[5] Ricketts v. Turquand, 1 H. L. C. 472.
[6] Doe d. Chichester v. Oxenden, 3 Taunt. 147.
[7] Per Lord Cottenham, in Ricketts v. Turquand, 1 H. L. C. 472 (490).

primary and appropriate sense, and in the light of the facts proved, no other meaning can be imposed on them by outside evidence.[1]

Passing on from these preliminary considerations, we find that the extrinsic evidence, the admissibility of which in construction we are considering, is divided into two great classes. And much light will be thrown on the subject if we here carefully notice the distinction between them.

To this end then, we will suppose that in construing a given will a dispute has arisen concerning the proper meaning to be attributed to one of its words, phrases, or provisions. The rule of construction applicable to the point, here steps in and says that *primâ facie* it shall receive a specified meaning which we will call x. It is contended, however, that in reality it should be given another meaning, which we will call y. To show the soundness of this latter view, it is proposed, in the absence of satisfactory intrinsic evidence, to offer extrinsic evidence of two kinds. First, it is proposed to prove what were the actual *facts* which have a logical bearing on the subject and in the light of which testator executed his will,—facts, for instance, such as the number of testator's children; the fact that all his children were illegitimate; the fact that he had no nephews of his own, but that his wife had nephews, etc., according to the nature of the point in dispute. This is one of the two classes of extrinsic evidence, and the purpose of it is to lay a foundation of facts from which the mind of the judge will logically draw the conclusion that the testator *must have intended* the disputed term in the sense designated y. It is also proposed to show by direct extrinsic evidence exactly *what his intent was*,—as, for example, by testimony that at the time of executing the will he declared that he used this term in the sense designated y.

The statement of these two classes of evidence shows the distinction between them. One produces underlying facts tending to indicate as a matter of reasoning from the existence of these facts that testator must have meant so-and-so; the other aims directly at the point of intent, and is to the effect that in reality his intent was so-and-so.

The former class of extrinsic evidence of facts is admissible in

[1] Wigram on Wills, Prop. II.

several cases; the latter only in one. We will first consider the cases where the underlying *facts* may be shown, and will then consider the one case in which the intent itself may be shown by direct extrinsic evidence.

(*a*). *Extrinsic evidence of underlying facts.*

If, as we have seen, a term, taken in its primary and natural sense, is applicable, with accuracy sufficient on reasonable grounds to satisfy the mind, in reference to an existing object or subject, it is not allowable to introduce extrinsic evidence to show that testator did not mean to use the term in its primary sense.[1] But where there is no object or subject thus covered by the natural and primary meaning of the term employed, here evidence may be admitted to show that interpreting the term in a popular or less appropriate sense there is an object or subject answering thereto, with sufficient legal and reasonable certainty to satisfy the mind of the judge.[2] Thus, if testator by will gives property to the "children" of a deceased person, here, if there are legitimate children of that person, extrinsic evidence is not admissible to show that in fact he also had illegitimate children. But if there were no legitimate chil-

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[1] Wigram on Wills, Prop. II.; Appel v. Byers, 98 Penn. St. 479. The full force of this rule seemed somewhat shaken by the decision in Grant v. Grant, L. R. 5 C. P. (Exch.) 727, where testator devised property to "my nephew Joseph Grant," and, though he had such a nephew of his own, extrinsic evidence was admitted to show the fact that a nephew of testator's wife was also named Joseph Grant, and had been brought up by testator, etc., and that testator was ignorant of the existence of his own nephew. The court go, however, on the ground that "nephew" was a word properly—though not with equal strictness—applicable to each, and that therefore there was an *equivocation*—as hereafter explained. Their view was that to all intents, and according to usual practice, it might be said that the term was applicable with substantial equality to both persons (see *In re* Parker, L. R. 17 Chan. D. 265). But in Wells v. Wells, L. R. 18 Eq. 504 (1874), Jessel, M. R., disapproved and declined to follow Grant v. Grant, and held that under a bequest to "all my nephews and nieces," there being such, no extrinsic evidence was admissible to show that a niece of testatrix's husband was included (even though the will itself had elsewhere named her as "my niece.") The court in Merrill v. Morton, L. R. 17 Chan. Div. 382 (1881), took the same course; compare Cloak v. Hammond, L. R. 34 Chan. D. 255.

[2] Wigram on Wills, Prop. III.

dren answering the description, extrinsic evidence is admissible to show that he had illegitimate children; so, also, in case of a gift to testator's "nephews," when in fact he had none and never could have any (as, if his father and mother were dead, and he had no brother or sister), here extrinsic evidence is admissible to show that there were nephews of testator's wife.[1] This evidence is only admitted to show the *facts*, and not to show directly what testator's *intent* was.[2] The conclusion as to the intent follows, in such case, as a logical deduction from the facts shown.[3]

The foregoing rule does not of course apply where the term used in the will refers to a state of facts existing not at the date of execution, but at the date of testator's death, or any time succeeding the execution. For if the term was used with this latter view, obviously the fact that at the date of execution there was no subject or object, corresponding to its strict meaning, would not logically point to the conclusion that testator must have used the word in a popular or less appropriate sense in reference to any other actually existing subject or object. For testator, though knowing that there was then no subject or object such as he named, may have contemplated the possible or perhaps probable existence thereof at the future time in view. Thus in the case just mentioned of a gift to "children," if the parent of the "children" had been living, testator, though knowing that he had only illegitimate children, may have contemplated only the contingency of his yet having legitimate children, and have intended to provide for such if they should come into being.

It should here further be added that as, in a class of cases already alluded to, the fact that there is no object or subject answering to the primary meaning of the term employed, will open the door to proof that there *is* an object or subject which the term does cover if taken in a popular or less appropriate sense; so also we find that where the obstacle in the way of giving a term its strict and primary meaning arises not from the lack of an object or subject answering to it when so interpreted, but arises instead from the context of the will, here also the door is opened for evidence of facts showing that the term can take on a secondary or

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[1] Sherratt v. Mountford, L. R. 8 Ch. 928. See note 2, *ante*, page 462.

[2] 1 Jarman on Wills, 424, note (*l*).

[3] 1 Jarman on Wills, 423.

more popular meaning which will render it reasonable, give it effect, and make it harmonious with the context.[1]

In the cases thus far considered, though evidence of the first class is admitted to show the *facts*, evidence of the second class to show the *intent* directly is not admitted.

Before proceeding to consider the admissibility of the second class of extrinsic evidence, attention should here be called to the fact that inasmuch, as we have just seen, the courts may, wherever there is no object or subject answering to the term in the will, in its primary sense, look at the actual underlying facts, to see whether there is any object or subject answering to the term in any other allowable sense, it therefore follows from this as a necessary corollary that in *all cases* the court may receive evidence of the underlying facts in order to ascertain whether, in the given cases, there are or are not objects or subjects answering to the primary and appropriate meaning of the term in question.[2] If there are, the inquiry ceases, and no further evidence is admissible. If there are not, further evidence of the *facts*, bearing on the question whether there are other objects or subjects answering to the term in a less appropriate but allowable sense is admissible. If this evidence shows that such do exist, the judge *draws the logical conclusion* from these facts as to testator's intent. But no direct evidence of the intent itself is admitted, and if, after all the *facts* have been shown, the term in question is, as the saying is, still insensible, it will be void for uncertainty.[3]

(*b*). *Extrinsic direct evidence of intent.*

Coming now to another class of cases, it will be seen that in the case of any term used by testator to refer to persons or property, it may turn out that although the term employed seems plain enough on its face, there are in fact two, or perhaps more, persons or things answering to it with precision. In all such cases, both of the classes of extrinsic evidence already considered may have a logical bearing—first, evidence to show that there really are two or more objects or subjects equally answering to the description;[4] and sec-

[1] 1 Jarman on Wills (4th Eng. ed.), 419; Doe d. Gore v. Langton, 2 B. & A. (680), 698.

[2] Wigram on Wills, Prop. V.

[3] Wigram on Wills (O'Hara's ed.), 175.

[4] Wigram on Wills, Prop. V.

ond, evidence to show which of these was *meant* by the testator.[1] As to the first of these classes, it is always admissible in such cases, as well as in those we have already considered. But the second class, aimed at directly showing testator's *intent*, though excluded in the cases already considered, is here admitted. These cases now under consideration constitute what are known as *equivocations*. That is to say, the term employed is equally applicable to each of several persons or things. These equivocations comprise one branch of what, in a well-known but often misunderstood and misapplied phrase, are known as *latent ambiguities*. A latent ambiguity exists where a term used appears, on the face of the will, to be clear and free from any ambiguity at all, and that is only shown to involve an ambiguity by extrinsic evidence showing facts that render two or more meanings equally possible. Thus if a testator devises "my manor of Dale," no ambiguity appears on the face of the will. But if it is shown by extrinsic evidence of the facts that he really had two manors, one of North Dale, and one of South Dale, it is seen that the term employed contained within it a hidden, or *latent*, ambiguity.

A *patent* ambiguity is one that is shown to be such on the very face of the will, by the statements there made, as, for example, a bequest of "some of my best linen,"[2] or a devise to "the best men of the White Towers."[3] Here the ambiguity or uncertainty shows on the face of the instrument, and consists in a failure on testator's part to decide just what objects or subjects he did mean.

Now it has often been said that in cases of patent ambiguity no extrinsic evidence of intent is admissible, while it is admissible in all cases of latent ambiguity. This statement of the rule is, to say the least, misleading, and, as often understood, erroneous. For the term latent ambiguity is a broad one covering not only *equivocations* (which have just been described, and which constitute one kind of latent ambiguity), but also other cases. Now extrinsic evidence of *intent* is admissible only in that class of latent ambiguities known as "equivocations."[4] In this class, the extrinsic evidence

[1] Wigram on Wills, Prop. VII.; 1 Greenl. on Evidence, § 289.

[2] Peck v. Halsey, 2 P. Wms. 387.

[3] Year Book, 49 Edw. 3; cited in Winter v. Perratt, 9 Clark & F. 688.

[4] Hiscocks v. Hiscocks, 5 M. & W. 363; Doe d. Lord v. Needs, 2 M. & W. 129; Miller v. Travers, 8 Bing. 244.

may be of any sort which, upon general principles, is relevant and material on the question of testator's intent, including testator's declarations on the subject.[1] In order to raise a true equivocation, it is not necessary that the description should be in all respects accurate and perfect.[2] It is sufficient if it applies to each of the several persons or things indifferently, and to the particular person or thing, to which the judge applies it, with such legal certainty as to satisfy his mind that such is the person or thing meant.[3]

To sum up, then, extrinsic evidence may be given to translate, or decipher; or to show the facts relating to the person claiming, or the thing claimed, under the will. Next, where there is any ambiguity, that is, any double meaning, it is either patent or latent. If patent, the underlying facts may be shown in order to put the judge, so to speak, into the atmosphere surrounding the testator. If, in the light of these facts, the term used is sensible, it must be applied without any direct evidence of *intent;* if insensible, the provision must fail. If latent, then in all cases the underlying *facts* may here also be shown. If, in their light, the meaning is sufficiently clear to satisfy the mind of the judge, it must be applied; if still insensible, the provision fails. Thus far the rules concerning latent and patent ambiguities are alike. In the one particular class of latent ambiguities known as *equivocations*, already described, further extrinsic direct evidence of *intent* is admitted.

Thus it appears that extrinsic evidence of the *facts* is admitted in all cases of both latent and patent ambiguities, while extrinsic direct evidence of intent is admissible in only one class of latent ambiguities. And this is all there is in the rule concerning latent and patent ambiguities.[4]

There is some variance in the degree of strictness with which extrinsic evidence of intent is excluded in the various American courts, but the general tendency is toward a closer adherence to the established rules.

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[1] Wigram on Wills, § 187.
[2] Cloak v. Hammond, L. R. 34 Ch. D. 255.
[3] Wigram on Wills, § 186.
[4] See a valuable note on the subject in 2 Parsons on Contracts, 557 (*e*).

DEFINITIONS.

In addition to the explanations of numerous terms already made in the foregoing pages, the following definitions are here given:

Bequest, a testamentary disposition of personal property. This word, and its verb "bequeath," are sometimes used by unskilled testators as synonymous with "devise," and in such cases the intent governs.

Devise, a testamentary disposition of real property. The word is sometimes used by unskilled testators as synonymous with "bequest," and in such cases the intent governs.

Executory devise. For definition, and distinction between them and remainders, see 2 Blackstone's Commentaries, 172, 173.

Gift Causa Mortis. Such a gift must (1) be made in actual expectation of impending death, and (2) must be accompanied by delivery, and (3) to perfect it the donor's death must in fact ensue, and (4) it must be accepted by the donee.[1]

Holographic Will. In its usual sense, this word refers merely to a will which is entirely in testator's own handwriting.

Legacy, a testamentary gift, more properly of personal property, but very frequently employed in popular usage to designate any testamentary gift whether of realty or personalty. A distinction is to be noticed between three classes of legacies,—*specific*, *demonstrative*, and *general*. A *specific* legacy applies to certain specified property, as, "my brown horse," or "my gold watch."[2] A *demonstrative* legacy applies to a certain amount of money to be paid from a particular fund.[3] A *general* legacy applies to

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[1] Basket v. Hassell, 17 Otto 602, and the foot-note thereto in the Lawyers' Coop. Ed.

[2] Wallace v. Wallace, 28 N. H. 149 (154).

[3] Giddings v. Seward, 16 N. Y. 365.

money, or other personal property in general, without designating a specific article or particular fund.[1]

If it turns out that the assets are deficient, a specific legacy will not thereby suffer abatement with the general legacies.[2] In the case of ademption (that is, where the subject of the bequest is altered or parted with or where testator has provided for the purpose of the legacy by other means,[3]) or where the subject of gift is in fact inadequate to fulfil the term employed in the will, a specific legacy cannot be made good from the general assets. Under these same circumstances, a demonstrative legacy would be made good,[4] thus faring in this respect like a general legacy; but in case of abatement it is not scaled down, thus in this respect faring like a specific legacy.[5]

Testament, as in the phrase "last will and testament," or "last testament," is nowadays used with the same meaning as the word "will."

Will. A will is one's solemn declaration, in legal form, and revocable during his life, making a disposition of his property to take effect at his death.

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[1] Bliven v. Seymour, 88 N. Y. 469.
[2] Towle v. Swasey, 106 Mass. 100 (106).
[3] Williams on Executors, 204.
[4] Wilcox v. Wilcox, 13 All. 252 (256).
[5] Coleman v. Coleman, 2 Ves. Jr. 639 (640).

APPENDIX.

APPENDIX.

THE ENGLISH WILLS ACT.

(1 Vict., c. 26, July 3d, 1837.)

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: (that is to say) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King *Charles* the Second, intituled *An act for taking away the court of wards and liveries and tenures*, in capite *and by knights service, and purveyance, and for settling a revenue upon His Majesty in lieu thereof*, or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King *Charles* the Second, intituled *An act for taking away the court of wards and liveries and tenures*, in capite *and by knights service*, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several

persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And be it further enacted, that an act passed in the thirty-second year of the reign of King *Henry* the Eighth, intituled *The act of wills, wards, and primer seisins, whereby a man may devise two parts of his land;* and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King *Henry* the Eighth, intituled *The bill concerning the explanation of wills;* and also an act passed in the parliament of *Ireland*, in the tenth year of the reign of King *Charles* the First, intituled *An act how lands, tenements, etc., may be disposed by will or otherwise and concerning wards and primer seisins;* and also so much of an act passed in the twenty-ninth year of the reign of King *Charles* the Second, intituled *An act for prevention of frauds and perjuries*, and of an act passed in the parliament of *Ireland* in the seventh year of the reign of King *William* the Third, intituled *An act for prevention of frauds and perjuries*, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estates being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen *Anne*, intituled *An act for the amendment of the law and the better advancement of justice*, and of an act passed in the parliament of *Ireland* in the sixth year of the reign of Queen *Anne*, intituled *An act for the amendment of the law and the better advancement of justice*, as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King *George* the Second, intituled *An act to amend the law concerning common recoveries, and to explain and amend an act made in the twenty-ninth year of the reign of King* Charles *the Second, intituled* "*An act for prevention of frauds and perjuries*," as relates to estates *pur autre vie;* and also an act passed in the twenty-fifth year of the reign of King *George* the Second, intituled *An act for avoiding and putting an end to certain doubts*

and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain *called* England, *and in His Majesty's colonies and plantations in* America, except so far as relates to his majesty's colonies and plantations in *America;* and also an act passed in the parliament of *Ireland* in the same twenty-fifth year of the reign of King *George* the Second, intituled *An act for the avoiding and putting an end to certain doubts and questions relating to the attestations of wills and codicils concerning real estates;* and also an act passed in the fifty-fifth year of the reign of King *George* the Third, intituled *An act to remove certain difficulties in the disposition of copyhold estates by will,* shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie,* to which this act does not extend.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie,* whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and

whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

IV.[1] Provided, always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will, shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will,

[1] See 4 & 5 Vict. c. 35, §§ 88–90.

or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

V. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either

by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof[1] by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

[By the Statute 15 and 16 Vict., ch. 24, (1852), it was provided as follows:

I. Where by an act passed in the first year of the reign of Her Majesty Queen Victoria, intituled *An act for the amendment of the laws with respect to wills*, it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature,

[1] Compare the later statute in the next paragraph.

or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after, or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

II. (Relates to the effect of the act on wills already made).

III. (Relates to the interpretation of the word "will" under the act).

IV. This act may be cited as, "The Wills Act Amendment Act, 1852."]

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner, or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act.

XII. And be it further enacted, that this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his majesty King *George* the Fourth, and the first year of the reign of his late majesty King *William*

the Fourth, intituled *An act to amend and consolidate the laws relating to the pay of the royal navy*, respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect to services in Her Majesty's navy.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a

will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions).

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will, after the execution thereof, shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXII. And be it further enacted, that no will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or re-

lating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXV. And be it further enacted, that, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

XXVI. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

XXVII. And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property de-

scribed in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

XXVIII. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

XXIX. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

XXX. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

XXXI. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall

not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

XXXII. And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIII. And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIV. And be it further enacted, that this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

XXXV. And be it further enacted, that this act shall not extend to *Scotland*.

XXXVI. And be it further enacted, that this act may be amended, altered, or repealed by any act or acts to be passed in this present session of parliament.

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